# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD NEW YORK DIVISION OF JUDGES

THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS,

Respondent

and

Case No. 29-CA-136515

PARIS YOUNG, an Individual

Annie L. Hsu, Esq. and Jaime D. Cosloy, Esq.
for the General Counsel.

Tara Eyer Daub, Esq. and Alexander E. Gallin, Esq.
for the Respondent.

Melissa S. Chan, Esq.
for the Charging Party.

#### **DECISION**

### STATEMENT OF THE CASE

Steven Fish, Administrative Law Judge. Pursuant to charges filed by Paris Young on September 10, 2014, in Case No. 29-CA-136515 and amended charges filed on October 2, 2014, November 21, 2014 and December 29, 2014 respectively, The Director for Region 29 issued a complaint and Notice of Hearing on February 25, 2015, alleging that The New York Hospital Medical Center of Queens (Respondent), violated Section 8(a)(1) of the Act, by suspending Paris Young on August 20, 2014, and discharging him on September 3, 2014 because he engaged in protected concerted activities, and by creating the impression among its employees that their protected concerted activities were under surveillance by Respondent, impliedly threatening its employees with unspecified reprisals because they raised concerns to management and interrogated employees regarding their protected concerted activities, and by threatening employees with progressive discipline because they engaged in protected concerted activity.

The trial with respect to the allegations in the above complaint was held before me on June 16 through 19, and June 22 and 23, 2015. Briefs have been filed and have been carefully considered.

On August 27, 2015, General Counsel filed a motion to file an answering brief to Respondent's brief, "in order to address the claim that Respondent raised for the first time in its brief to the ALJ". General Counsel filed its answering brief on the same date.

Thereafter, Respondent filed an opposition to General Counsel's motion to file an answering brief, and requested that the request be denied. In Respondent's opposition, it disputed General Counsel's assertion that Respondent raised a claim for the first time in its brief to the Judge. Furthermore, Respondent responded to the assertions made by General Counsel, concerning the issue of Respondent's knowledge of Young's protected concerted activities.

While I tend to agree with Respondent that the issue of knowledge of Young's protected concerted activities was clearly in issue, and was litigated, the specific issue of Richard Verrette, Respondent's Administrative Director of Respiratory Services, having knowledge of young's concerted activities was not clearly defined.

While I agree with Respondent, that since the issue of knowledge of Young's protected concerted activities was raised, that General Counsel should have recognized the issue of Verrette's knowledge of Young's protected activities needed to be addressed, and should have been done in the original brief, I, none-the-less believe that is appropriate to grant General Counsel's motion and accept General Counsel's reply brief.

I note that in Respondent's opposition to General Counsel's Motion, it responded to General Counsel's Reply Brief, concerning the issue of knowledge of Young's protected concerted activities. I shall therefore also receive Respondent's opposition, and consider it as a reply brief to General Counsel's reply brief.

While reply briefs are not ordinarily permitted, they can be accepted at the Judge's discretion. *Gallup, Inc.* 349 NLRB 1213, 1217 (2007), *Salem Electric* 331 NLRB 1575, 1578 fn. 3, *Fruehauf Corp* 274 NLRB 403 fn. 2 (1985)

In the above circumstance, I have exercised my discretion and will receive and consider General Counsel's reply brief, as well as Respondent's opposition.

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Based upon the entire record<sup>1</sup>, including my observation of the demeanor of the witnesses, I make the following;

## **Findings of Fact**

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#### I. Jurisdiction

Respondent is a not-for-profit corporation, with an office and place of business located at 56-45 Main Street, Flushing, New York (Respondent's facility), which has been operating a hospital providing inpatient and outpatient medical care. Annually, in the course and conduct of their business, Respondent derived gross services in excess of \$250,000 and purchased and received at its Flushing, New York facility, goods valued in excess of \$5,000 directly from points outside of the state of New York.

It is admitted and I so find that Respondent is an employer engaged in commerce within the meaning of Section 2(2),(6) and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act.

#### II. Facts

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## A. Respondent's Operations and Supervisory and Managerial Structure

Richard Verrette is the Administrative Director of the Respiratory Care Department. Verrette reports to Mary Godfrey, Vice President for Professional Services and Strategic Planning. Lorraine Orlando is Vice President for the Human Resources Department and Kristen Ernst a/k/a Friedl is Respondent's Employee Relations Manager who reports to Orlando.

Pervaiz Ansari and Herman Cespedes are Respiratory Supervisors who report to Verrette. They have authority to discipline employees, but will usually discuss any disciplinary action with Verrette before issuance. The supervisors also have the authority to issue coachings or counselings to employees, which are considered "educational' in nature. Ansari became supervisor in 2012, starting as supervisor for the night shift, and then in 2013, became supervisor of the day shift.

#### B. Paris Young

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Paris Young began working for Respondent as a Respiratory Therapist in 1990. He reported to the RT Supervisor and to the Administrative Director. Verrette became the Administrative Director in January of 2010. Verrette had previously supervised Young at Montefiore Hospital and they had an amicable relationship there.

<sup>&</sup>lt;sup>1</sup> In its brief General Counsel moved to correct the transcript. No opposition has been filed. Accordingly the transcript, p. 767 lines 24-25 should read "Q-Did you ever tell Ms. Webb during this meeting that she was manipulative".

However, according to Young, he began to receive disciplinary actions in 2012, which he attributed to Ansari's promotion to supervisor, and Young's past history with Ansari while employed at Montefiore Hospital.

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Young explained that he was a part time supervisor at Montefiore, and Ansari was a per-diem RT there. According to Young, Ansari had accused one of the former supervisors of racially discriminating against him. Young disagreed with that and thought that accusation was wrong.

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Young also recounts that on another occasion, Ansari, accused Young of hitting him at one point in the office. According to Young, HR investigated and there were two other people in the office, at the time of the alleged incident. Nothing was found and the matter was dropped.

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Young also asserts that he had a conversation with Ansari in 2011, during which Ansari made a comment to him about understanding the motivation about 9/11, and Young asserts that he completely disagreed with that.

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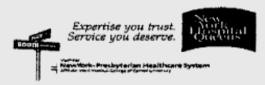
On 3/24/11 Young received a copy of his 2011 annual evaluation, prepared by Jacob John, who was his direct supervisor at that time. The overall rating was satisfactory, and most of the comments were positive. However, the evaluation did make one negative comment, to which Young objected, and he initially refused to sign the document. The comment "Paris has shown reluctance in accepting request for training and orientation of new employees." Eventually, Young signed the evaluation on 4/11/11.

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On September 7, 2012, John and Ansari met with Young and verbally coached Young on the importance of maintaining accuracy and completeness on Allscript documentation and compliance on departmental procedures. A second coaching session was held on 09/19/12, by Cespedes and John.

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The above coachings were documented in a document entitled <u>Counseling</u>, dated 09/19/12 and signed by John and Cespedes. The document is as follows:



## Counseling

#### Paris Young

Department: Respiratory Care Date: 9/19/12 Subject: Documentation

#### Details of Occurrence:

- 2) MR# 8/2/12, 10 am nebulizer treatment did not have medication and frequency documented. Notified by Pervaiz Ansari to correct on 9/7/12 with Jacob John present. Has not been corrected as of yer. After 2<sup>rd</sup> coaching session on 9/19/12 by Herman Cespedes and Jacob John, Mr. Young told Herman Cespedes that Allscripts would not allow for any more modification on this document, which was verified by Pervaiz Ansari.
- 3) MR#: 8/2/12, 4 pm nebulizer treatment had the wrong dose of the medication given (0.63 mg Levalbutero) charted, instead of 1.25 mg that was ordered) documented as per physician order. Notified by Pervaiz Ansari to correct on 9/7/12 with Jacob John present. Has been corrected on 1" coaching session.
- 4) Therapytrack for 9/14/12 not done by end of shift, not completed as of 9/19/12. Coached on 9/19/12 by Herman Cespedes and Jacob John. Therapytrack completed by Mr. Young on 9/19/12 after 1" coaching by Herman Cespedes and Jacob John.

#### Action taken:

Mr. Jacob John and Mr. Pervaiz Ansari verbally coached Mr. Paris Young on 9/1/12 on the importance of maintaining accuracy and completeness in Allscript documentation and compliance to departmental procedures. Second coaching session held on 9/19/12 by Herman Cespedes and Jacob John.

Mr. Young corrected/completed items 3 and 4 after the  $1^{\prime\prime\prime}$  coaching sessions. Item 1 was corrected after the  $2^{\prime\prime\prime\prime}$  coaching session. Although item 2 is the same patient as item 3 on the same date, item 2 was not corrected but item 1 was corrected after the  $1^{\prime\prime\prime}$  coaching session on 9/7/12. The documentation system would not allow for correction now for item 2 possibly due to the long lapse of time from the original document date, which was verified by Pervaiz Ansam.

Supervisors,

JACOB JOHN

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HERMAN CESPEDES

As a result of the counseling, Young approached Verrette, complained to him about the counseling, and told Verrette that he did not want to talk to or deal with John anymore, but wanted to deal directly with Verrette on any of these matters.

Verrette responded that Young would have to speak to John who is his supervisor and they needed to be able to communicate and have a relationship.

Young then sent an email to Lorraine Orlando, Respondent's V.P. OF Human Resources, on 09/23/12, with an attachment. The email reads: "I regret that I have to enter this document into my employee file. Recent behavior by members of the supervisory staff has been questionable." The document reads:

#### 9/23/2012

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Mrs. Lorraine Orlando, President Human Resources New York Hospital Medical Center of Queens 5645 Main Street, Flushing, NY 11355

#### Dear Mrs. Orlando:

I am submitting a chronicle of recent events, I have been an employee at NYHQ for over 20 years, in excellent standing. Recent managerial behavior has required this documentation to my chart.

8/2012, Mr. Pervalz Ansari, supervisor, after informing me of a new practice with the beeper system chose to highlight the incident on the assignment sheet after resolution had been achieved. I consulted with Mr. Richard Verrette, director, as to the implied future implication of the act; he dismissed the event.

9/7/2012, I was called into the office by Mr. Ansarl to discuss incorrect entries on a patient in the presence of Mr. Jacob John, supervisor. Mr. John also informed me of an incorrect entry on a different patient. I researched Mr. Ansarl's patient and found inconsistences with his claims. I came back to the office for clarity. After inquiring about the patient; Mr. Ansarl responded "I don't have to repeat myself to you" Mr. John was present. I consulted with Mr. Verrette later in the day to discuss the incident; he was aware of the altercation, but had no knowledge of the statement. I informed him that I did not want to take the situation out of the department, his response "You do what you have to do and I'B do what I have to do."

9/7/2012, When I examined the patient mentioned I observed Mr. John I observed incorrect entries by other therapists, 8/27/2012.

9/19/2012, Mr. John and I examined the patient entries again, at which time he changed the date to 8/22/2012. It witnessed no corrections for the date, 8/27/2012 as of 9/19/2012 the information is still incorrect.

9/19/2012, I was informed by Mr. Herman Cespedes, another supervisor, that I had not entered my Therapy Track data for 9/14/2012. But, I vividity recall entering that information. I am well aware of the fact that entries in this system can be deleted by a manager and is untraceable.

9/19/2012, While In the respiratory therapy administrative office, Mr. Cespedes pointed out a missed entry about the Therapy Track in the staff disciplinary book. When I asked about several recent entries, Mr. John and Mr. Cespedes were reluctant to answer. Instead, Mr. John replied: "Just correct the entries, it's no big deal," However, the sheet provided to me illustrating the information (copy from his NYHQ profile, Eclipsys) contained a minimized panel stating: Paris Young counseling.

The NYHQ - Code of Conduct strictly condemns acts of retaliation, unethical practices and harassment.

Sincerely,

Paris Young BS, RRT

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In December of 2012 Ernst attempted to intervene in an attempt to diffuse the problems Young was having with his supervisors. Ernst met with Vererette and Young, and they discussed issues Young was having with his supervisors, primarily with John and Ansari.

After this meeting, Ernst set up another meeting this time with Young and all of his supervisors in an attempt to resolve the issues Young had with the supervisory staff. Young felt that he was being harassed by his supervisors, and not being treated fairly.

The meeting with all of Young's supervisors and Ernst was held, sometime in early 2013. The outcome of the meeting was that everyone agreed that going forward they would put everything behind them and try to work together. After the meeting, Ernst asked Young to stay behind and asked if he felt comfortable with everything. Young told him that he would try to put it behind him.

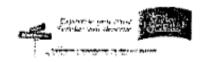
On February 21, 2013, Young sent the following email to Ernst: subject, meeting, February 21. The email reads: I would like to thank you for your time, and effort, yesterday. Thanks again, Paris Young!

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On 7/15/13 Young received a verbal warning documenting conduct that occurred on 7/10/13. It was signed by Ansari and Cespesdes, but Young refused to sign the document. It reads as follows:



#### NEW YORK HOSPITAL OF QUEENS

#### RECORD OF OFFENSE AND WARNING

Employee Name: Parls Young

Job Title: Registered Respiratory Therapist Date Of Occurrence: 7/10/2013 Department: RESPIRATORY CARE Date Disciplinary Issued: 7/15/2013

Nature Of Offense: Failure to be Present in Assigned Area as per Departmental Procedure

#### Details of Occurrence:

Ms. Juliya Savich was contacted in the Supervisors' office by a Nurse stating that Mr. Young was needed by the physicians in MICU and could not be reached because Mr. Young's hospital phone was in the unit charging at approximately 10:15sm on 7/10/2013. Mr. Young was found in the Respiratory Staff office by Mr. Pervalz Ansari and Ms. Savich immediately after receiving the call from the Nurse, by the computer near the printer. Mr. Young was informed of the situation by Mr. Ansari and Ms. Savich. At this point, Mr. Young called the MICU from the Respiratory Staff office.

#### Action Taken:

It is departmental procedure for the Respiratory Therapist to be present in their assigned area to provide optimal patient care. Mr. Young was non-compliant because he was not in his assigned area, MICU, a Critical Care Unit, where Respiratory Therapists work in conjunction with physicians and other health care professionals to assure delivery of optimal care to patients that require extensive attention and frequent rounding, nor was Mr. Young accessible to the Critical Care Unit by his hospital phone because his hospital phone was not in his possession while charging in the MICU. When informed by Mr. Ansari and Ms. Savich, Mr. Young first called the MICU, rather than going to his assigned area immediately, a Critical Care Unit, to assess the circumstances and recover his hospital phone.

#### Employee Explanation/Comments:

On October 31, 2013, Respondent issued Young a verbal counseling for failing to comply with departmental procedures, by leaving shift reports, prior to announcements being made. The counseling, signed by Verrette and Ansari, reflected 5 separate occasions, between 9/16/13 and

10/31/13, that Young left shift report early, and violated shift report policy. The counseling is as follows:

#### VERBAL COUNSELING

10/31/2013

9:45am

TOPIC: SHIFT REPORT/ANNOUNCEMENTS

Mr. Parls Young has left the staff office immediately during morning shift report prior to announcements on numerous occasions, being non-compliant with the shift report policy and memo. Mr. Young was verbally counseled by Mr. Verrette and Mr. Ansari regarding this situation, reinforcing that Mr. Young should remain in the staff office till approximately 7:15 am AS STATED IN THE MEMO, for possible announcements. Below are the listed occurrences:

- 1. 9/16/2013, 6:55am entered staff office, 6:59am exited staff office
- 9/18/2013, 6:56am entered staff office, 7:01am exited staff office (witnessed by Joseph Mathew)
- 9/23/2013, 5:58am entered staff office, 7:02am exited staff office (witnessed by Joseph Mathew)
- 4. 10/3/2013, 7:00am entered staff office, 7:05am exited staff office
- 5. 10/31/2013, 7:00am entered staff office, 7:02am exited staff office

Richard Verrette

Pervaiz Ansari

Present: Juliya Savich

On January 6, 2014, Young left the unit to which he was assigned, the Cardiac Catheterization Lab (CCL), and was not available when a Nurse sought his assistance with a patient requiring respiratory therapy. Unable to locate Young, the Nurse contacted the Respiratory case office. It was discovered that Young was not responding to the Nurse's calls because he had failed to program his Hospital cell phone to receive calls from the Cardiac Care Lab to his extension at the start of the shift, in violation of departmental procedures. Accordingly, Verrette and Ansari issued a written warning to Young, dated 1/10/14 documenting the above events. It is set forth below.



#### RECORD OF OFFENSE AND WARNING

Employee Name: PARIS YOUNG

Job Title: Registered Respiratory Therapist

Date Of Occurrence: 1/8/2014

Department: RESPIRATORY CARE Date Disciplinary Issued: 1/10/2014

Nature Of Offices: FORWARDING ASSIGNED AREAS TO SPECTRA LINK PHONE.

Octails of Occurrence:

The Respiratory Care office was contacted by a Nurse from the Cardiac Catheterization

The Respiratory Care office was contacted by a Nurse from the Cardiac Catheterization Lab at approximately 1:20pm on Monday, 1/6/2014, for a patient requiring Respiratory Therapy. The Nurse stated that several attempts were made to contact the Tharapist covering at the Cath Lab's designated extension 7459 for Respiratory Care and nobody was picking up. An attempt was made by the Respiratory Care office to contact the covering Respiratory Therapist at the Calh Lab number at extension 7459. The name and number of the RT covering the Cath Lab the night before came up on the telephones display. This demonstrated that Mr. Young did not program his phone to receive calls from the Cardiac Cath Lab to his extension (7161). Once the situation was verified. Mr. Young was contacted directly on his personal spectra link extension 7191 by the Administrative Director of the Respiratory Therspy and was directed to the Guth Lab to resolve the patient's needs to avoid further delays. A half hour after speaking to Mr. Young extension 7459 was called to verify that the cath tab calls were being forwarded to 7161. It was verified that 7161 did come up on the telephone display, which indicates the phone was reprogrammed.

A follow up meeting with the Director of Respiratory and Mr. Young was done on 1/9/14. Mr. Young was asked his side of the incident. He replied that the Nurse was calling the wrong number. When he was asked why the RTs number who worked the night shift prior came up when the Cath lab's extension was called, Mr. Young had no reply. The changing of the programming 30 minutes after calling him would indicate Mr. Young was aware of the problem.

but he did not discuss this during the follow up meeting.

Action Taken:
Verbal Warning X Written Warning Suspension Olecharge/Termination it is Departmental procedure for staff members to program their assigned coverage
areas to their personal apactra link phones on the call-forwarding switchboard in the staff office
during shift change. This allows patient care areas to contact their assigned Respiratory
Therapist, facilitating direct communication and ilmely responses to the needs of our patients.
Mr. Young was assigned Cardlec Catheterization Lab on 1/8/2014 and was unable to be
reached by a Nurse when a patient required Respiratory Therapy. Mr. Young must forward his
assigned areas to his personal spectra link phone during shift change as per Departmental
procedure, so he is able to be able to provide timely patient care. The Verbal Warning on
7/10/13 had to do with leaving his phone in the office to charge while being out of his assigned
area. This event indicates a pattern of behavior where Mr. Young cannot be accessed by the
areas he is covering in the event of an emergency, immediate improvement

Previous Co	unseling and/or Disciplin	ary Actions:
Date	Type of Action	Offense
7/10/2013	VERBAL WARNING	Failure to be Present in Assigned Area

Employee Explanation/Comments:

Subsequently, Young filed a grievance protesting this written warning, and at the grievance meeting with Ernst and Verrette shared for the first time that during this incident he had appropriately programmed his phone on the morning of January 6, 2014. Young asserted that his "Spectralink System" had many issues, and that it somehow reverted back to the number of the person working the prior shift. In response to the most recent excuse offered by Young, Verrette communicated with Respondent's IT Department, as well as Respondent's telecommunication vendor and confirmed that Young's excuse was not plausible, as the phones was not de-programmed. Ernst denied Young's grievance on January 21, 2014. The denial is set forth below.



Sent via email

38-45 Main Stant, Floring, NY 15855 / Til. 718-670-1221 / www.sybe.org

January 21, 2014

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Paris Young Respiratory Therapy

RE: 2<sup>nd</sup> Step Grievance - Written Warning

Dear Mr. Young,

I have reviewed the testimony taken at 2<sup>ed</sup> step grievance hearing held on January 16, 2014 regarding the written warning you received for failure to forward your spectra link phone to your assigned area.

During the meeting, you claimed that you did forward your phone to the Cardiac Catheterization Lab when you arrived the morning of January 6, 2014. You further claimed that the spectra link system has many issues and that it reverted back to the number of the person who worked the overnight shift before you. Richard Verrette, Director-Respiratory Therapy, stated that this was the first time that he was ever told that the system had this type of issue. I asked him to look into the system further; to see if it was possible that the phone could revert back to someone else's number on its own.

Mr. Verrette inquired with our IT department and received the attached response from Eric Nieves. Mr. Nieves also inquired with our telecommunications vender (SGA) and confirmed that the phone will not de-program itself once it is programed.

After a careful review of the facts presented at the hearing and confirming with our vendor, I am upholding the written warning. The grievance is therefore denied.

Sincerely,

Kristin Ernst

Employee Relations Manager

Cc: R. Verrette

JD(NY)-46-15

Young did not appeal Ernst's decision to deny his grievance.

On January 22, 2014, Respondent issued Young a verbal counseling, signed by Ansari, for failing to follow Respondent's sick call policy. The counseling is as follows:

## VERBAL COUNSELING

1/22/2014

9:45am, Supervisors' Office

TOPIC: Sick call notification when no Supervisor/Lead RY on duty

On 1/18/2014, Mr. Paris Young called Mr. Pervaiz Ansari at 8:45pm and left a message to call in sick for 1/19 (Sunday). Mr. Ansari called back within minutes and left a message for Mr. Young to call the staff and notify a staff member that he was calling in sick for the next day, at which point the staff would contact the on-call Supervisor as per Departmental procedure. Mr. Ansari was not on-call; Mr. Verrette was on-call.

On 1/22/2014, the Departmental procedure for sick call notification was reviewed with Mr. Young in the presence of Mr. Verrette and Ms. Savich, specifically when no Supervisor/Lead RT is on duty. Mr. Young was explained to notify the Supervisor that is on duty; if no Supervisor is on duty, then a Lead RT on duty must be notified; if no Supervisor/Lead RT is on duty, then a staff member must be notified, who will contact the on-call Supervisor. Any person calling in sick must follow the Departmental procedure to properly provide notification for possible replacement coverage.

Pervait Ansari

Present: Richard Verrette, Juliya Savich

On March 28, 2014 Young was counseled again for failing to adhere to departmental policy, this time concerning Young's failure to properly document patients. High Flow Nasal Cannula. This counseling was issued by Ansari, in the presence of Verrette and reads as follows:

Verbal Counseling

3/28/2014

10:00am

Supervisors' Office

Topic: High Flow Nasal Cannula (HFNC) Documentation

Paris Young was verbally counseled regarding non-compliant documentation of HFNC standards as per memorandum posted on 1/27/2014 (Allscripts Documentation/Updates) on the patient on the next sheet. The oxygen and Flow (LPM) should be documented in the top macro (Inspiratory Flow), not in the Device macro.

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Present: Juliya Savich, Richard Verrette

On April 7, 2014 Young again left the unit to which he was assigned without his cell phone, resulting in the Nurse contacting Ansari directly to request an aerosolized medication for a patient. When Ansari called Young to notify him of the request for treatment, Young did not answer his cell phone. Instead, someone at the Nursing station answered the phone, and explained that the cell phone was found unattended and the RT covering the unit could not be reached. Ansari assigned another RT to administer the required treatment.

Young's failure to keep his assigned communication device on his person not only violated departmental procedure, it was also the third instance during a nine month period in which Young had left his assigned unit when contacted for patient care needs.

Verrette consulted with HR, and decided to suspend Young for one day, because of Young's pattern of behavior, where Young could not be accessed in the area he was covering.

The Disciplinary Notice, dated, April 7, 2014, was signed by Verrette and Ansari, Young signed it under protest, but made no other comments to Verrette or Ansari about it. The suspension notice is set forth below:



#### NEW YORK HOSPITAL OF QUEENS RECORD OF OFFENSE AND WARNING

Employee Name: PARIS YOUNG Job Title: Registered Respiratory Therapist Date Of Occurrence: 4/7/2014	Department: RESPIRATORY CARE Date Disciplinary Issued: 4/8/2014 1/9/24/7 F.d.
Nature Of Offense: FAILURE TO MAINTAIN COMM	UNICATION DEVICE
requesting a aerosolized medication a patient. The nu- was unable to reach the covering Respiratory Therapis RT covering, Mr. Paris Young, at the RT 4 West exten- aerosolized medication. When Mr. Ansart cated 7323 at the nursing station picked up Mr. Young's phone an the RT covering could not be reached. At this point, Mr. Therapist to administer the medication for patient 11:30am, until Mr. Ansart could tocate Mr. Young, Mr. ward clark to take Mr. Young's phone from the nursing As Mr. Ansart was leaving 4 West to locate Mr. Young walking onto the 4 West floor. At this point, Mr. Ansart explained to Mr. Young that the phone was found unat-	st to administer the freatment. Mr. Ansari called the sion 7323 to notify him of the request for the .  Mr. Young did not pick up the phone; an individual deplained the phone was found on this floor and fr. Ansari was able to get another Respiratory at approximately.  Ansari went to 4 West and was directed by the station, which was being held by the nursing staff, and give him his phone back, Mr. Young was it handed the phone over to Mr. Young and
Action Taken:	
	y Therapist, allowing direct communication and ng was assigned to 4 Wast on 477/2014 and failed Young's communication device was found was unable to reach to Mr. Young to administer a ad response for the needs of that patient requiring 13 had to do with isaving his phone in the office to on Warning on 1/10/2014 reparted failure to se swants indicate a pattern of behavior where Mr. in the event of an emergency. There must be an
1/10/2014 WRITTEN WARNING Forwarding A	Offense asigned Areas to Spectratink Phone Present in Assigned Area
Clashe Protest	,
Employee's Signature: 72 01	Date: 1/7/4/7
Supervisor's Signature:	PERVAIZ ANSARI Date: 4/4/2019
Alliana Cinastrus / Cold	A SA 4

On April 29, 2014, Young received a counseling for violation of Respondent's sick call notification procedure, which reflected three instances of Young violating Respondent's procedures, dated 1/22/14, 1/18/14 and 4/18/14. This counseling is set forth below:



## Counseling

**PARIS YOUNG** 

Department: RESPIRATORY CARE

Date: Subject:

4/29/2014 SICK CALL NOTIFICATION PROCEDURES

#### OETAILS:

On 4/18/2014, Mr. Paris Young called Mr. Pervaiz Ansari, the on-call Supervisor, at approximately 5:30am and left a message to call in sick.

On 1/18/2014, Mr. Paris Young called Mr. Pervaiz Ansari at 8:45pm and loft a message to call in sick for 1/19 (Sunday). Mr. Ansari was not on-call; Mr. Verrotte was on-call.

On 1/22/2014, the Departmental procedure for sick call notification was reviewed with Mr. Young in a verbal counseling in the presence of Mr. Verrette and Ms. Savich, specifically when no Supervisor/Lead RT is on duty. Mr. Young was explained to notify the Supervisor that is on duty; if no Supervisor is on duty, then a Lead RT on duty must be notified; if no Supervisor/Lead RT is on duty, then a staff member must be notified, who will contact the on-call Supervisor.

#### EXPECTATIONS:

Any person cailing in sick must follow the Departmental procedure to properly provide notification for possible replacement coverage and maintain uniformity in the notification procedure, memo posted 7/27/2012.

PARIS YOUNG

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RICHARD VERRETTE

When Young met with Ansari and Verrette to administer the counseling, Young exhibited confrontational and passive aggressive behavior toward Ansari. More specifically, when Ansari asked Young to come into the office, Young walked out, requiring Ansari to go into the hallway and ask that he return. When Young did return, he refused to close the office door, choosing instead to stand and keep his leg in the door open so that staff could overhear the discussion, and during the discussion denied ever having a prior discussion regarding sick calls procedures.

Verrette then sent an email to Ernst, documenting Young's behavior with Ansari. It is as follows:

#### Kristin L. Friedl

From: Kristin L. Friedl

Sent: Tuesday, April 29, 2014 4:37 PM

To: Richard Verrette

Subject: RE; Paris Young's behavior with Pervaiz Ansari

Let's talk tomorrow?

Kristin Ernst Employee Labor Relations Manager Human Resources

New York Hospital Queens 56-45 Main Street Flushing, NY 11358 (718) 670-1671 - Phone (718) 445-0658 - Fax



From: Richard Verrette

Sent: Tuesday, April 29, 2014 11:57 AM

To: Kristin L. Friedl

Subject: Paris Young's behavior with Pervaiz Ansari

Kristín.

Paris came by the supervisor's office to hand his daily ready to go list to Pervaiz approximately 10AM. When coming into the office he always keeps one foot in the door so the door is open to the hallway. Pervaiz handed him the ESTA Notice of Acknowledgement of Employee Rights on a clipboard to sign. He said that he could not sign it now, and review it later. Pervaiz asked Paris to close the door so he could speak to him about something that happened. Paris went outside into the hallway. Pervaiz had to get up and go into the hallway to request Paris a second time to come into the office. Paris came back in, but put his leg in the door. The doorway was wide open for staff, patients, and their family members to overhear the discussion. Pervaiz wanted to discuss the appropriate follow up when call in sick. It was a counseling of what the expected practice would be. Paris denied ever having a prior discussion of this which was documented on 1/22/14 and witnessed by Juliya and myself. I was required to call Paris and requested the ESTA form within a hour. I explained to him the form was only an acknowledgement that he has received the paperwork. He said OK, and was not beliggerent with me.

The issue with the sick call procedure is a small thing that I don't want to make a big deal out of. What concerns me is the constant passive-aggressive behavior where every chance Paris interacts with Pervaix he tries to undermine him. I need for Paris to start acting more maturely when dealing with Pervaix. Any recommendations on how I should handle this?

On 4/29/14, Young sent the following email to Ernst, protesting the counseling. It reads, "I would like to protest the counseling I just received. This is starting to get really serious."

## Ernst responded by email as follows:

#### Kristin L. Friedl

From:

Kristin L Fried!

Sent:

Tuesday, April 29, 2014 4:17 PM

To: Subject: Paris Young RE: counseling protest

There is no procedure to protest a counseling. They can counsel staff at any time about anything they feel fit. It is not a discipline, it's a record of a conversation that a manger/supervisor has will a staff member. They need to be able to discuss concerns that they are having with you or any of the staff members. There isn't much I can do for this issue.

Kristin Ernst

Employee Labor Relations Manager

Human Resources

New York Hospital Queens 56-45 Main Street Flushing, NY 11358 (718) 870-1671 - Phone (718) 445-0858 - Fax



NewYork-Presbyterian 1 Healthcare System there well benefit the unideal

From: Paris Young

Sent: Tuesday, April 29, 2014 3:32 PM

To: Kristin L. Friedl

Subject: counseling protest

I would like to protest the counseling I just received. This is starting to get really serious.

Paris Young

Confidential information society to NYP's (and its affiliates) information management and security position (http://mitopet.mic.org/QA/HospitalHazusa).

## C. Respondent's Announcement of Change from Twelve to Eight Hour Shifts

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On February 24, 2014, Verrette along with Godfrey issued a memo to the Respiratory Care Department regarding Respondent's need to close an anticipated budgetary gap of ten million dollars in 2014. The memo with attachments was distributed to RT's at a meeting and discussed with employees by Godfrey and Verrette.

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The memo announced that the department would convert from a 12 hour "flex time" (3 day) scheduling model to a standard (5 day) schedule effective June 15, 2014. This would result in a 10% reduction in the number of employees (i.e. through reduced per diem hours) required to staff at the same level and was estimated to save the department approximately \$350,000.

Respondent was aware that the scheduling change would likely result in hardships for some RT's, who have other jobs. Thus the RT's were given 4 months' notice prior to the implementation date of June 15, 2014.

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Paris Young was not present at this meeting. A number of employees spoke up, and expressed dissatisfaction with the proposed plan, including asking why nursing was not also going in that direction. Raqquyah Webb an RT also spoke up and suggested that the hospital could possibly save money without the employees having to go to eight hour shifts. Godfrey added that his door was open to speak with anyone.

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After this meeting Young met with Webb and a few other RT's and came up with the idea of creating an alternate plan to present to Respondent that would maintain 12 hour shifts. After multiple discussions regarding the shift change, Webb, Young and Sophia Pierre, another RT created a letter dated 4/18/14, to be submitted to Godfrey requesting a meeting regarding the impending shift changes. Attached to the letter was a petition, signed by forty-one RT's, including Young, Webb and Pierre, in support of the letter.

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Starting approximately March 21, 2014, during shift reports, Young and several other therapists solicited signatures for the petition. Young testified that Ansari and Cespedes saw these solicitations in the office. After all signatures were solicited, it was decided that Webb and Pierre should bring the petition and the letter to Respondent.

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On or about April 9, 2014, Webb and Pierre brought the completed letter and petition to Respondent's HR Department. They spoke to Ernst and delivered the letter and petition to her. They asked for a meeting with Godfrey to discuss cost savings options other than switching to 8 hour shifts. Webb and Pierre requested that the meeting be just with Godfrey and HR, and that it not involve Respiratory Therapy Management.

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Webb explained to Ernst that Verrette and Ansari lead with fear and punishment, which included writing up and suspending employees. Ernst informed Webb and Pierre that she would serve the documents presented to her, discuss it, and see if a meeting could be scheduled. Ernst asked both Webb and Pierre for their phone numbers and said that she would ask Godfrey to reach out to them directly. Subsequently Webb was contacted by Ernst, and a meeting was set up for April 16, 2014.

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At the conclusion of the meeting between Pierre, Webb and Ernst, Webb and Pierre exited the Human Resources Department and walked past Verrette in the hallway. They said hello to each other, and had no further conversation. Verrette was at HR to drop off the final signed copy of Young's suspension, issued to him earlier that morning.

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Ernst brought the letter and petition to Orlando and they discussed it. They then called Godfrey to discuss the letter and its contents, and it was agreed that Godfrey would meet with the employees as requested. According to Respondent's witnesses, they did not provide Godfrey a copy of the letter or the petition.

Verrette testified further that he never saw a copy of the letter or petition, and was unaware that a petition had been signed by any employees in regard to the request for a meeting.

As noted above, the meeting took place on April 16, 2014. The RT's decided that Young would present the employees proposals to management. He prepared a four page proposal to present to Respondent at the meeting.

Present at the meeting were 15 to 20 RT's and Orlando, Ernst and Godfrey on behalf of Respondent.

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Godfrey began the meeting by thanking the RT's for the letter and advising that she was happy to listen to any alternative proposals. Young then handed out a PowerPoint presentation to Godfrey and the other attendees, which contained a proposal of the employees in response to Respondent's proposal. The employees proposal made various alternatives including adding a 13<sup>th</sup> shift, eliminating conference benefits, proposing making an entire day, donating money to Respondent, and giving up time off of their educational days.

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After Young finished discussing the employee proposals, Godfrey thanked the RT's again and indicated that while the numbers in the proposal did not match the Hospital's projected savings, Respondent would look into and determine the viability of the proposals, and get back to the employees and have another meeting with the employees.

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After this meeting Godfrey gave the employees' proposal (the PowerPoint printout), which had no names on it to Verrette to review. Godfrey didn't inform Verrette who had prepared or discussed the proposal at the meeting with employees. Verrette testified that he did not know that Young had presented the proposal at the meeting, as a spokesperson for the employees. Verrette also testified that he did not know anything about a petition being signed by employees, or who signed the petition.

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Verrette reviewed the employees' proposals, calculated the savings involved, and concluded that the proposals would not result in savings equal to the proposed transition to the 8 hour schedule.

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However, Verrette did conclude that the employees' proposal for 13 shifts a month was potentially viable, and would recommend it, but the overtime issue was a problem. That is, nurses are deemed to be professional employees, and are exempt from overtime requirements. RT's on the other hand do not qualify as professional employees under the relevant statutes. Therefore the employees' proposal for the 13 shifts per month would result in significant overtime costs. Respondent attempted to resolve this issue, and these were extensive discussions with Legal, Finance and HR, to see if there was any way to get around the overtime issue, and perhaps go forward with the proposal of 13 shifts per month.

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On May 1, 2014, Verrette met with the RT staff during morning shift change, and informed them that Respondent was looking into the viability of the employees' proposal to maintain the 12 hour shifts. He informed the employees that RT's are considered technical, and not professional

under the state license classification, and that "we have different obstacles then Nursing in getting this achieved. Verrette told the employees that he will be meeting with HR, Payroll and Finance" to see how we can work around some of those issues." He told the employees that the final update regarding the shift change will be answered as soon as Respondent confirms that the changes comply with state, HR, Payroll and Finance rules.

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Ultimately, after extensive discussions, including obtaining a second legal opinion, on the overtime issue, it was concluded by Respondent's officials that the overtime costs associated with the 13<sup>th</sup> shift were unavoidable and significant, and would have eliminated any cost savings. Thus Respondent decided to go forward with the 8 hour shift.

On June 2, 2014 Godfrey and Verrette met with the RT staff and advised that Respondent had reviewed the employees' proposals, and that they did not work out financially, and Respondent would be going ahead with the shift change to eight hour shifts. Because it had taken so long to thoroughly investigate the employees proposal, Respondent concluded that it no longer seemed fair to implement the new shift change on June 15, 2014, as originally proposed. Instead, Godfrey and Verrette announced the implantation would be extended to July 13, 2014.

On June 30, 2014, at the staff meeting, Respondent mentioned that the 5 day schedule will be completed soon and posted. It also states "the department realizes the imposition used by the new scheduling system. The department is open and flexible to accommodate requests by the staff members during this difficult transition period." Respondent transitioned to the new staffing model on July 13, 2014.

#### D. The Events of July 7, 2014

On July 7, 2014, Raqquyah Webb was instructed by Ansari to go to Verrette's office for a meeting. Webb was informed that she was being suspended for two days for excessive absenteeism and abandonment of her post. Webb was informed on both June 20 and June 27 that she could not take off on June 8, 2014 to travel to see her grandmother in Georgia. Webb then called in sick for June 28, 2014, thereby creating a staffing shortage and impermissibly extending her vacation, which was scheduled to start the following day. (June 24, 2014)

Web denied that she was trying to extend her vacation, and asserted that her grandmother was ill, and gave Verrette a doctor's note regarding her grandmother's health.

Verrette told Webb that by taking such day it was as if she said "FU" to the department. Verrette then called Webb manipulative and sneaky and that she did not appreciate her attempts to use a sick day when she was obviously not sick, especially so soon after her 2-week furlough. In that regard Webb had been furloughed for two weeks starting 2/28/14, because she failed to get her credentials renewed, which resulted in Respondent being short staffed for three weeks.

Verrette testified that he was frustrated with Webb's behavior and she seemed to have no remorse, in that she had been furloughed for three weeks, causing a terrible hardship for the

department. Now she has done it again, by taking sick leave, when she wasn't sick, after twice being denied by Respondent of her requests to take personal days.

Verrette also referred to the fact that she had seen her (and Sophia Pierre), coming out of Human Resources in early April of 2014, and asked "why didn't you communicate directly with me," and told her if she had concerns that she should speak to him first, as the Director of the department.

According to Verrette, he had no idea that Webb and Pierre were at HR in early April to present the petition to Ernst. Verrette testified that he assumed that Webb was at HR to confirm about her furlough which had ended shortly before April of 2014.

Webb responded that Verrette should look at the way he is talking to her, and added "this is the reason why I don't communicate with you."

Webb then asked if she could be excused? Verrette said yes and Webb left.

Her suspension notice that she was given reads as follows:

#### **NEW YORK HOSPITAL QUEENS**

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#### **RECORD OF OFFENSE AND WARNING**

Employee: Raqquyah Webb Job Title: Respiratory Therapist Date of Occurrence: 6/28/2014

Department Respiratory Care
Date Disciplinary Issued: 7/7/2014

Nature of Offense: EXCESSIVE ABSENTEEISM/ABANDONMENT

#### Details of Occurrence:

Miss Webb was scheduled to work the night shift on Saturday, 6/28/2014. Miss Webb was scheduled to begin vacation starting the day after on 6/29/2014 till 7/6/2014. Miss Webb called in sick for Saturday 6/28/14, resulting in a staff shortage of 6 staff members for that night, prior to this transpiration, there was a sequence of events that lead to this situation. After returning from a previous vacation, Miss Webb approached Mr. Herman Cespedes on 6/20/14 to request a day off for Saturday 6/28/14, which she was scheduled to work on and the day that Miss Webb ultimately called in sick. Mr. Cespedes did not approve the day off and suggested to Miss Webb to seek alternative possibilities, such as switching with another staff member. On Monday 6/23/2014, Miss Webb switched her shift from Wednesday 6/25/2014 to Tuesday 6/24/2014 with another staff member, thereby lumping the shifts together. On Friday 6/27/2014, Miss Webb called Mr. Cespedes for an emergency day for Saturday 6/28/2014. Mr. Cespedes did not approve the emergency day for 6/28/2014 that Miss Webb requested. Lastly on 6/28/2014, Miss Webb called in sick for that Saturday 6/28/2014 to the Lead Therapist on duty resulting in a staffing shortage and extending her vacation.

#### 45 Action Taken:

Verbal Warnin	y Written Warning	X Suspension	Discharge
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Miss Webb is highly encouraged to comply with maintaining an adequate attendance record. The excessive absenteeism has resulted in staffing shortages. Staffing shortages could result in poor or unsafe care of our patients. This occurrence had ensued in a staffing shortage and abandonment of duty that results in a disciplinary action of a two day suspension, inclusive of the day that Miss Webb called in sick, Saturday 6/28/2014. Future events of this nature will result in further progressive disciplinary action up to termination/discharge.

## 10 Previous Disciplinary Actions:

	<u>Date</u>	Type of Action	<u>Offense</u>
	6/10/2014	Verbal Warning	Incomplete Shift Report
	3/27/2014	Written Warning	Excessive Absences/Furlough
15	2/28/2014	Unpaid Furlough	Furlough due to Credential Renewal/Verification
	10/9/2012 Verbal Warning		Documentation
	6/25/12	Written Warning	Non-compliance with hand hygiene policy (5/2012, 1/2012)

## **Employee Explanation/Comments:**

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My finding with respect to the conversation between Webb and Verrette is based on a compilation of the credited positions of the testimony of Ansari, Webb and Verrette. Most of the facts are essentially not in dispute. I credit Webb that Verrette said by taking a sick day it was it was as if she said "FU" to the department and that Verrette informed her that she was being manipulative and sneaky by taking the sick day. I do not credit Webb's testimony that Verrette told her that he had "caught her and Pierre" red handed at HR. In that regard I note that when Webb furnished her version of the events of July 7, 2014 to Ernst sent on August of 2014, Webb made no mention of this alleged comment by Verrette.

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## E. The Events of August 20, 2014 and the Subsequent Termination of Young's Employment

On August 20, 2014, Young was assigned to cover the Respiratory Disease Management Unit RDMU on 5 North. Young noticed that he had eleven patients to care for. During shift change at around 7:00 am Young complained regarding the amount of patients that he had been assigned and asked who was going to help him. Ansari informed Young, "give us a few minutes, we will work it out." Ansari told Young to meet in the supervisor's office at shift change and that Joseph Matthew, lead therapist would also be present. Ansari and Matthew went to the supervisor's office at about 7:15 am, Young was not there. Matthew and Ansari then went looking for Young in RDMU to discuss the matter, but he was not there either.

In fact, the reason that Young was not on the floor, is because rather than going to his unit to begin working, he decided to go down to the cafeteria to grab a cup of coffee.

Ansari, surprised that Young had not gone to RDMU after shift report, called Young on his cell to determine his location. Ansari asked Young where he was, so he could speak to him regarding his workload. Young did not say where he was, advised Ansari that he would be back at RMDU shortly and hung up the phone on Ansari, while Ansari was still talking. Ansari then called Young back and told him to meet him in the supervisor's office with Matthew. Young said ok. Ansari went to the supervisor's office, but Young was not there. Ansari then received a call from Young, who informed him that he had come to the staff office and Ansari wasn't there but Matthew was, so he left. Ansari then asked Young to come to the supervisor's office.

At around 7:45 am, Young arrived at the supervisor's office. Matthew was present along with Ansari. During this meeting Ansari advised Young that Matthew wanted help Young with transports and had further agreed to take two of this patients in RMDU. This left Young with a total of nine patients for the day, all of whom needed vent checks by that morning and four whom required medications between the hours of 9:00 am – 11:00 am. Ansari also advised Young that if she needed any additional assistance he should speak to Matthew.

While Ansari was able to bring the meeting to an amicable resolution, he was concerned about Young's conduct that morning. Ansari was upset about Young's conduct during shift change, i.e., complaining about workload in public without addressing him or making eye contact with him and being unable to locate Young for a period of time. Thereafter, when he was not in his assigned area and that, Young hung up the phone on him during one of their phone conversations. Ansari therefore sent an email to Verrette at 9:14 am, entitled "Paris Young assignment concern for 8/20/14".

My findings with respect to these events is based on a compilation of the credited portions of the testimony of Ansari and Young, as well as the email from Ansari to Verrette describing the events, plus a contemporaneous email sent by Matthew to Verrette describing his version of the interactions between Ansari and Young for that day.

After the meeting ended, Young returned to the RDMU but instead of beginning to provide care to his remaining patients, he went to fifth floor lounge to send an email to Ansari confirming their conversation that Matthew will be doing ventilator documentation for two patients, beds 1 and 2. Young then accessed his personal email account to obtain a previously drafted document, dated 8/19/14 concerning issues with his phone. The email to Ernst reads "Due to the fact that my next communication issue may lead to my release, I have attached an incident that happened the other day. I continue to have issues with the telephone system. Would you please address or resolve this issue in my file".

In his memo to Ernst, Young recounted his version of the events of 8/19/14, concerning problems with his phone, wherein it was programmed to the voice mail of RT Darryl Montana. In this memo he accused Montana of reprogramming Young's phone to his line. Montana denied that he had done so. At the trial, Young testified that he believed that Montana had reprogrammed the phone, so that Young's phone was programmed for his extension because there were some issues with Young and Montana and because of Montana's close relationship, with Ansari. Young added that it was possible that Montana was trying to set Young up.

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At around 8:00 am Young performed a ventilator check. A vent check involves sound assessment, pulse altimetry, suctioning patients if necessary and recording settings into the Electronic Medical Records EMR 1. According to Young the entire process of ventilator checking generally takes between 5 and 20 minutes for each one.

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According to Young, between 8:00 am and 9:18 am he completed vent checks for all of his nine patients, except that he didn't enter the information into the EMR system, except for the first vent check. According to Young it takes about 15 minutes to input that vent check into the system, and then realized that it was time to go to the supervisor's office to deliver his ready to go list.

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Young arrived at Verrette's office gave him the "ready to go list." Verrette having received Ansari's email summarizing the events of the morning, asked Young to come into the office to speak about the morning's events. Prior to Young arriving, Ansari and Verrette were discussing the morning's events, including Ansari's observation that Young was "grandstanding" and made a "public display to show disrespect." At that point Verrette and Ansari had not yet discussed issuing Young a counseling or any disciplinary action as a result of this incident.

Young opened the door to Verrette's office, dropped off the "ready to go list" but kept his foot in the door and refused to come into the office. Verrette asked Young to come into the office and close the door, to speak about the morning's events. Young initially refused to come into the office and close the door as requested by Verrette. Young testified that he hesitated to come in because Verrette appeared upset and they had a history.

Verrette said to Young that he needed to come into the office because there were patients outside and they needed privacy for their discussion.

Finally after three or four requests, Young agreed to come into the office and close the door. When he came in, Young said that it was hostile in the office, and commented "whoa aggressive" Verrette told Young that it was important to act professionally with his supervisor and he was insubordinate and belligerent in his dealings with Ansari, Cespedes and Verrette. Verrette informed Young that he was making the transition impossible, in that there were scheduling issues and they needed to work together on this. Verrette explained that Young's conduct earlier that morning, made a situation already difficult by being short staffed due to a sick call, more difficult by his outburst during shift change. Verrette explained that Young's conduct doesn't reflect to the "We Care" values that we are trying to achieve. Verrette mentioned another example that happened the prior week, when Young was on speaker phone with Ansari, and Verrette overheard Ansari requesting an update on any issues with the scanner for medication administration. Young responded in an unpleasant tone "you asked me this yesterday." Verrette repeated to Young that if he had a question he should discuss it professionally. During the entire time that Verrette was addressing Young, Young was staring at the wall 90 degrees from Verrette and not looking at him. Verrette told Young to look at him in the eyes when Verrette speaks to him. At this point, according to Young, Verrette was standing close to him, and when he was speaking Verrette's spit landed on Young's face. Young conceded that Verrette did not intentionally spit at him, but contends that Verrette was upset and raising his

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voice and when speaking his spit accidentally landed on Young's face.

Young then said this is not o.k., and walked out of the office. Verrette told him to come back into the office, and that he had not finished their discussion. Young ignored Verrette's request to return. Verrette then advised Young that his failure to return to the office would result in progressive discipline. Young did not return to the office and kept walking down the hall and into a stairwell.

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Young immediately returned to the computer in the fifth floor lounge and sent the following email to Ernst:

Good Morning,

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I just had a very angry one sided conversation with Mr. Ansari, Mr. Verrette and Ms. Savage. Mr. Verrette approached me insisting that I was obstructive, that I must close the door behind me (I went to drop off the ready to go list). I was standing. Upon closing the door behind me Mr. Verrette approached closer standing. His voice was raised. I told him I didn't feel comfortable with him. He pressed stating that he didn't like my attitude. I looked away to avoid a staring contest.

He responded "You look in my eyes when I talk to you!" I said whoa. I feel uncomfortable and exited. He said this would lead to progressive discipline that we would have to meet with HR.

I feel threatened both bodily and mentally. I need to work someplace that is safe.

Thank you, Paris Young

Young testified that he felt threatened by Verrette and that in the past Verrette had informed Young that he's very good at fighting, willing to fight, and that he had a black belt in karate. According to Young he then went to the bathroom, washed the spit off his face, and thought about what he should

Young he then went to the bathroom, washed the spit off his face, and thought about what he should do next, because he did not know what was going to happen. At around 10:00 am, Young exited the bathroom and saw Sonia Cortes who was covering the other half of the unit. Young told Cortes that he was leaving the unit and he would be back shortly. Cortes replied, "fine, no problem see you later baby."

According to Young, when he told Cortes that he would be back shortly, he did not know where he was going and how long he would be away from the unit. Young also admitted that he did not expect Cortes to do his vent checks and give the medications to his patients.

At that point Young was undecided whether he was going to the HR, to Security or somewhere else, but he asserts that he felt threatened and couldn't return to work in that state. He finally decided to go to Security. He went to the Security office on the basement level, in the back of the hospital. He asked to speak with Kevin Campbell, the Director of Security. Campbell was not at the Hospital that day; Young was directed to Harry Stafilias, Assistant Director of Security. Young told Stafilias that Verrette was "coming at me" telling him that he was insubordinate and belligerent and that Young felt threatened by Verrette. Young told Stafilias that Verrette knows karate and he was afraid that he may be hurt by Verrette.

Stafilias told Young that there was no imminent threat, Verrette was not in the room and this was a matter for HR to handle. After Young repeated he was afraid of Verrette and that Verrette knows karate, Young then asked Stafilias to call HR.

Stafilias then called HR and spoke to Dina Panatelias, a lower level HR employee. He told her that Paris Young was at security and had said that he felt threatened by Verrette. Verrette asked for Ernst, but Panatelias informed Stafilias that Ernst was not in that day. Stafilias then called Ernst or her cell phone. Stafilias informed Ernst that Young was in his office and there was an issue in respiratory, between Young and Verrette. He told Ernst that Young had stated that he felt threatened by Verrette. Ernst told Stafilias that she would not be in the office, but would try to reach out to Orlando, who was also out of the office that day. Ernst instructed Stafilias that no one from HR would be coming in, but to hold until someone calls him back.

At 10:08 am Verrette not knowing where Young was or that he had not gone back to work after leaving Verrette's office, sent the following email to Ernst:

Kristin,

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Paris Young came into the office at 9:30AM to drop off his daily log to give to Pervaiz. He usually holds the office door open, and only enters the office with one foot. Since he was in the office I thought I would speak to him about what occurred this morning (see email below). I asked him to come into the office. His body language demonstrated that he would not come in. I had to ask him several times to come in the office. He stated that I was being aggressive. I was not intending to be aggressive, but was firm because employee was ignoring me when I requested to speak to him. I told him that I need to speak with him privately, and I did not want to discuss any issues for other staff and patients family members to hear. I explained to him that it was his right to disagree with the workload, but needed to do it professionally. There is a tone of disrespect and belligerence with a majority of his interactions with Pervaiz Ansari, Herman Cespedes, Joseph Matthew, and myself. I explained to him that it does not reflect the "WE CARE" values we are trying to achieve. I mentioned another example last week when he was on speaker phone last week with Pervaiz Ansari. I overheard Pervaiz Ansari requesting an update on any issues with the Barcode Scanner for medication administration. Paris Young responded in an unpleasant tone "you asked me this yesterday." We are currently reporting daily to Vicky Mackey to let her know if issues are resolving. I told Paris that if he has a question he should discuss it professionally. During the whole time he was staring at the left wall 90 degrees from me. I asked him to look at me when I was talking to him. He made some comment to me that this is not OK, and left the office. I requested that he come back, and he continued to walk to the stair to leave.

This is becoming a major problem. Can we please discuss the next appropriate step at your earliest convenience.

Rich Richard Verrette, RRT, RPSGT Administrative Director Respiratory Care Stafilias after his call from Ernst, returned to speak to Young. He informed Young that no one from HR would be coming. Stafilias asked Young if he had patients he should be taking care of. Young replied that he did. Stafilias asked if Young had to notify anyone as to where he was, and Young replied that no one knew that he was there. Staifilias did not tell Young that he had to stay at HR, or that he should or could go back to work. Staifilias did tell Young that he was waiting for a call from HR to call him back and it should be within a few minutes.

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At about 10:20 am Dina Panatelias called Verrette and informed him that she had received a call from Harry Stafilias, who informed her that Young was in security and had said that he felt threatened by Verrette. At that point Verrette told Panatelias that he would forward the email that he had sent earlier to Ernst, concerning the events between Young and Verrette earlier that morning.

At 10:32 am Verrette forwarded the email to Panatelias, c.c. to Orlando and Godfrey.

A few minutes before 11:00 a.m., Orlando telephoned Verrette and informed him that she had received the email and that based upon the circumstances, Young should be taken off duty pending further investigation.

Orlando also called Stafilias and informed him that Verrette would be coming down to security to take Young off duty.

At approximately 11:00 a.m Verrette came to the security office. In the presence of Stafilias, Verrette informed Young that he had spoken to HR and that Young was being taken off duty and that there would be a follow up meeting with HR. Verrette asked Young whether there was anything that needed to be done before he went off duty and Young replied, "No," and did not tell Verrette that he had patients that were overdue for medications or vent checks. Young handed Verrette his barcode scanner and walked out of the security office. Young was not holding any documents and did not hand any documents to Verrette.

After Young was taken off duty, he told Ansari to redistribute Young's work to other staff. Ansari reassigned Young's patients to Matthew and Cortes. Upon taking over these patients, Matthew and Cortes reviewed the patient's charts and discovered that, of the nine patients assigned to Young that day, he had only rendered care to one patient, since his shift began at 7:00 a.m. The records reflected that Young performed a single vent check at 8:00 a.m., and that he failed to administer necessary medications to three patients by 10:00 a.m. There is a two hour window, during which RT's can administer medication to patients, so on August 20, 2014 Young could have administered medications to his patients between 9 a.m. and 11 a.m. Because Young never told anyone that his patients had not received their necessary medications, this window lapsed without patients receiving their medications.

After Young left the building, he called HR and confirmed that the Respondent was putting him on leave. During that day, none of Young's patients went into distress or died.

The next day, August 21, 2014, Ernst returned to work. She discussed the events of August 20, 2014 with Verrette. She had received and read the emails. Verrette told Ernst about the earlier

incident with Ansari, where Young had hung up the phone on Ansari and that they were trying to find Young to arrange a discussion about arranging the schedule and Young wasn't in the unit. They finally reached Young on the phone and in the course of the conversation, Young hung up the phone on them. Eventually Young was located and they worked out the issue of Young's patients, and Matthew agreed to take two of these patients. Verrette told Ernst that he thought it would be a good opportunity to talk to Young about the problems he was having with Ansari. Verrette told Ernest that when Young came into the office, he hung in the doorway, and refused to come all the way in. Verrette informed Ernst that he pleaded with Young to come in and close the door and he had to ask him three times before Young agreed to come in. After they had some conversation, Verrette told Ernst that Young said that "whoa this is getting hostile" and opened the door and walked out.

Verrette told Ernst that Orlando subsequently called him and told him to take Young off duty. Verrette then informed Ernst that later that day Respondent found out that Young had not administered medications to his patients and had had performed only one vent check, leaving eight patients without vent checks. Verrette recommended and Ernest agreed that Young should be terminated because of Young's "lack of communication" regarding informing others that he would be away from his unit for a short period of time, Young's "contempt of authority", "always fighting with authority," his disciplinary history and that patients were abandoned. Additionally, Verrette defined Young walking out of his office earlier that day, and refusing to return upon being asked as "insubordination." Subsequently, Ernst discussed the issue with Orlando, and Orlando agreed that termination is appropriate. Verrette prepared the termination notice, which was given to Young on September 3, 2014, when Young returned from his vacation, which had started shortly after he was taken off duty. The discharge notice reads as follows:

25 Employee Name: PARIS YOUNG

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Job Title: Registered Respiratory Therapist Department; RESPIRATORY CARE

Date of Occurrence: 8/20/14

Nature of Offense: INSUBORDINATION

ABANDONMENT OF PATIENTS

NEGLIGENCE OF PATIENT CARE AND SAFETY

## **Details of Occurrence:**

On 8/20/2014 you came to the supervisor office at about 9:30 a.m. to drop off "your ready to go" list to your supervisor, Pervaiz (Rich Verrette and Juliya Savich were present). Rich needed to speak to you about an issue that occurred earlier that morning about your workload. He was asking you to come into the office. Your body language demonstrated that you would not come in. Rich had to ask you several times to come into your office. Your body language demonstrated that you would not come in. Richard had to ask you several times to come into the office but you did not. You were told that he needed to speak with you privately, and he did not want to discuss any issues for other staff and patient's family members to hear. You finally came in and closed the door. It was explained to you that it was your right to disagree with the workload, but needed to do it professionally. There is a tone of disrespect and belligerence with a majority of your interactions with your supervisors which you have been spoken to about in the past. Rich tried explained to you that it does not reflect the

"WE CARE" values we are trying to achieve. You were told that if you had a question you should discuss it professionally. During the whole time you were staring at the wall. Rich asked you to look at him when he was talking but your response was "this is not OK" and left the office. Rich requested that you come back, but you continued to walk away. At 10AM Rich receives a call from HR that you went to security. Shortly after, you were taken off duty.

After 11am we redistributed your assignment to other staff. After reviewing what needed to be done it was observed that:

- Between the hours of 7Am to 11AM only 1 ventilator check was documented for 1
  patient by you. There was no documentation that the other patients on life support
  were evaluated until Sonia Cortes and Joseph Matthew was notified by the supervisor
  they would be taking over.
- Three of the ventilator patients under your care were ordered for medications to be administered by 10AM. There is also no documentation that the medication was administered that morning by you.
- You did not notify Pervaiz, Joseph, or Rich that you left the floor. We only found about about it when HR called.
- Sonia Cortes' specifics of the report that was given to her when you left RDMU was "I
  am stepping off of the unit for a few minutes." At no time was she made aware by that
  he would not be available to administer medications, or visit his patients on life support
  for suctioning and assessment.
- See details of abandoned patients.

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25	COMMENTS	Time first surveillance	RT who did surveillance	Тх	Given	Tx time	Tx	Red done	Вох	
	Room #	e check for Shift done	check at that time	ordered (y/r		(y/n)	(y	/n)		
	North 516-	8:00 am	Paris `	Young	у	n 10:	00 am	n/a	У	
30	DYN-Q6 While	Э								
	2								awake	!
35	North 517- 1	8:20 am	Joseph Matthe	w y	у	10:00 am	Joseph	n	•	orted to LYSIS
35	North 517- 1	11:45 pm	Joseph Matthe	w n	n/a	n/a	n/a	n/a	n/a	
40	North 518- n/a 1	11:50 am	Joseph Matthe	w n r	n/a	n/a	n/a		n/a	
	North 519	11:55 am	Joseph Matthe	w n r	n/a	n/a	n/a		n/a	n/a

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	North 521- n/a	11:45 am	Sonia Cortes	n	n/a	n/a	n/a	n/a	
5	North 521- n/a 2	12:00 pm	Sonia Cortes	n	n/a	n/a	n/a	n/a	
	North 522 ATC	12:00 pm	Joseph Matthey	v y	n	10:00 am	n/a	у	D/N-Q6
10	North 523-	11:40 am	Joseph Matthey	v y	n	10:00 am	n/a	Pulmic y	con-BID D/N-Q6
	ATC, 1							Е	BIPAP
	Action Taken:  Verbal Warning Written Warning Suspension Discharge/Termination  Your bellawine has demonstrated disrespectful and beligerent behavior with your supervisors, tosubordination to your administrative director, and obandonment of your patients. An inability to properly inform any stail measurement has been properly inform any stail measurement and properly inform any your content interview recorded properly and properly inform any stail of the patients of the support were checked and evaluated by you believen the hours of 784 to 11AM when you went cit duty. Seven upon these actions and prior offenses you are being terminated effective immediately.  Previous Counseling andfar Olacipilinary Actions:  Others  ANDIZO14 SUSPENSION  1740/2013 SUSPENSION  7740/2013 VERBAL WARNING  Falure to maintain communication device Forwarding Assigned Area Falure to maintain communication device Forwarding Assigned Area Falure to the Present in Assigned Area  Employee's Signature:  Employee's Signature:  Date: 9/3/14  Witness Signature:  Date: 9/3/14								

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NYHQ 000023

On September 3, 2014, Young met with Verrette and Ansari. Verrette informed Young of Respondent's decision to terminate his employment, and handed him the termination notice which Young refused to sign.

On or about October 7, 2014, Young grieved his termination, pursuant to Respondent's internal grievance procedure. He met with Lorraine Orlando. Young explained to Orlando his reasons of the events of August 20, 2014. He told her that Verrette called him into the office "went at him", called him belligerent, and kept spitting at him and came closer to him. He told her that Verrette told him to look him in the eye, after which Young opened the door to leave, and Verrette told Young it possibly could lead to disciplinary action.

Young informed Orlando that Verrette told him that he had made the transition impossible, and that he believed that Verrette's supervisors told him that he had made the transition impossible, and that he believed that Verrette's aggression towards him was linked to the meeting regarding the changing of shifts from twelve patients to eight. According to Young, Orlando responded, "what meeting." Young described the meeting, but Orlando responded by looking at him as if she didn't remember the meeting, and shrugged her shoulders.

At no point during the meeting with Orlando, or during his meeting with Verrette on September 3, 2014, did Young assert that he had provided medication to his patients on August 20, 2014, or that he had performed all of the required vent checks on his patients for that day.

On October 31, 2014, Orlando upheld the termination of Young and denied his grievance. Her letter explaining her decision is as follows:

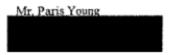
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October 31, 2014



Dear Mr. Young,

I have reviewed the information you provided to me during our grievance meeting, which occurred on October 17, 2014, relating to your termination from employment based on insubordination, abandomment of patients, and negligent patient care and safety, as set forth in the notice of termination dated September 3, 2013.

During the grievance meeting, you claimed that when Richard Verrette asked you to enter the office to have a private conversation, you were "trapped between a cabinet and a bookcase." You indicated that you looked away from Mr. Verrette, that he asked you to look at him while he was speaking, and that his question and demeanor made you feel intiminated so you opened the door and left. Mr. Ansari and Ms. Savich were also present. After you left the office, you allege that you told a fellow therapist that you were going off the floor for a few minutes.

Since our meeting I have reviewed your statements with informed parties. There was documentation, in writing, from the witnesses who were present in the office with you and who were involved in dealing with the subsequent events.

As an initial matter, I find that there was no aggressive or threatening behavior exhibited towards you by Mr. Verrette. Mr. Verrette's requests were appropriate, yet you refused to engage in an professional conversation with Mr. Verrette and left the office. Your actions in the office were unwarranted and insubordiante.

After you left the office, as you were leaving RDMU on 5 North, you told a fellow therapist only that you were going off the floor for a few minutes. You did nothing to inform the therapist that you would be gone beyond a few minutes, let alone indefinitely. You did not tell her that you would be unavailable to administer medications or to visit your patients on life support for suctioning and assessement. You did not notify any supervisor that you were leaving.

You then went down to the Security office in the basement. You had your Spectralink phone with you, yet failed to contact anyone regarding your patients' care and treatment. No supervisor was aware of your departure from the floor until Security contacted Mr. Verrette at about 10:00am.

Later, when the supervisor and other therapists attempted to determine what care you had provided to your patients since you came on shift at 7am, they found documentation of the treatment of only one patient. Three of the ventilator patients under your care were ordered for medications to be administered at 10am and there was no documentation that you administered medications. Based on my reivew and findings, I find that your serious misconduct constituted abandonment of your patients and negligence toware their patient care and safety.

I am upholding your termination from employment with the medical center.

Sincerely,

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Lonaine Orlando

Vice President for Human Resources

My findings with respect to the events of August 20, 2014 and October 7, 2014 are based on compilation of the credit pertaining of the testimony of Young, Verrette, Ernst, Savich, and Ansari, as well as contemporaneous e-mail accounts of the events by Young, Verrette, Ansari, Savich and Orlando's notes of her grievance meeting with Young. Most of the events are not significantly in dispute, except for whether Verrette mentioned anything about making the transition impossible, during his discussion with Young. Although both Verrette and Ansari denied that Verrette made any such comments, I have credited Young's testimony that Verrette did make this statement, as I conclude that it was supported by the testimony of Savich, who was Respondent's own witness.

Respondent's attorney was obviously quite surprised when she asked Savich whether Verrette said anything to Young about making a process impossible, and Savich responded "probably!" Respondent's attorney asked the question again, and Savich answered, "I believe so, something to that effect." Respondent's attorney continued to press the witness about this testimony, questioning her memory and observing that she may be confused. When she asked Savich for a fourth time, whether there was a discussion regarding the transition from twelve to eight hour shifts, Savich testified, "Yes, there was. They said we need to work on this there's scheduling issues, they were trying to work something out or something like that and that we needed to work on that."

After showing Savich a copy of her e-mail account of the meeting, (which contained no reference to statements about the transition), she asked Savich the same question again. Savich replied "I think we said it's been a difficult transition if that." Finally, Respondent's attorney asked Savich "Do you remember someone making this comment?" Savich responded, I don't think so." The attorney responded "Good," and ended the questioning.

I conclude that despite Respondent's attorney's attempts to persuade her own witness to change her testimony, that Savich's earlier testimony is credited, and that Verrette did say that the transition had been difficult and that there were scheduling issues and that we need to work together on this." Indeed, Verrette testified himself that he did mention that there was a sick call that day, and that Young's behavior with Ansari had made things more difficult.

## F. ALLEGED DISPARATE TREATMENT

General Counsel introduced into the record a number of documents reflecting disciplinary actions and coaching and counseling for a number of employees, which in its judgment established disparate treatment.

#### **GUY LOUIS JACQUES**

Guy Louis Jacques works for Respondent as an RT. He was suspended by Respondent on August 22, 2013 for failing to administer prescribed medications as ordered, failure to endorse medication to next shift, and falsification of documentation. Louis Jacques falsely documented that he had provided medication to a patient, when, in fact, he had not done so and failing to inform next shift of his failure to provide the patient with medication. As a result the patient went into distress and missed that dosage. Respondent suspended Louis Jacques even though he did not have any prior disciplinary actions, because the offense was so severe.

On July 10, 2014, Respondent issued Louis Jacques a verbal warning for failing to document a respiratory note making it unclear whether the patient received a nebulizer treatment. On Sept. 23, 2014, Respondent issued Louis Jacques a verbal warning for Accurate Shift Reporting 1 Documentation Follow-up. The Warning reflected that Louis Jacques failed to perform surveillance checks for a bipcentilation though a mask on a patient, neglected to do a shift evaluation with the surveillance check, and failed to endorse to the next caregiver to promptly take care of the patient's needs. The document reflected Louis Jacques violated the We-Care Values of the institution, and his negligence could have resulted in a potential risk. When cross examined as to why Respondent chose to issue Louis Jacques a verbal warning, after his previous verbal leaching. 2 months before, Verrette answered that it was because "the patient was all right." Louis Jacques is still employed by Respondent.

#### **EVILIO PEREZ**

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Evilio Perez a Senior RT who worked for Respondent for over twenty years, was issued a counseling session on September 9, 2013, for non-compliant documentation. This document issued by Cespedes and Ansari, reflected 3 instances of non-compliant documentation, on 7/10/13, 8/16/13 and 8/21/13. The document reflects that Perez has documented inconsistently with the Departmental Procedures on the above listed instances. Perez is encouraged to comply with Departmental Procedures.

On December 11, 2013, Cespedes issued Perez a Counseling Session for violating Respondent's We-Care Values by addressing his supervisor (Cespedes) inappropriately by calling him "Herminio." The document reflects that "this is not in compliance with the welcome value of the We-Care Values.

On January 14, 2014, Perez was suspended for leaving assigned clinical areas for extended time. Perez left the Unit and went to the staff office to chat from 10:57 pm to 12:01 am on 1/15/14. During the time that Perez was away from the Unit, the patient went into distress and died. Another

RT came into the room and tried to help the patient, but the patient became unresponsive, and went into cardiac arrest. The Cardiac team was unable to resuscitate the patient and the patient died.

The suspension notice stated that "Perez's poor clinical judgment of staying out of his assigned clinical area for an hour may have contributed to the poor clinical outcome of the patient. Based upon the clinical outcome, Perez will receive a 1 day suspension".

Verrette was cross examined about this suspension. He admitted that although the patient probably would have died regardless of whether Perez was at his assigned area, his presence may have changed the probability of death. Verrette issued a suspension to "explain the "serious potential" of "future things happening again." Verrette testified that the patient's death was a factor in the decision to suspend Perez, and that the incident was "severe."

However, Verrette refused to categorize this incident as "egregious," unlike Young's incidents leading up to his discharge because Young had numerous events and was not making any improvements. Perez is still working for Respondent.

### **FRANK TORRE**

Frank Torre, a lead RT received a Counseling Session on 11/28/12 for incomplete documentation. On April 30, 2013, Torre received a Verbal Warning for "Nebulizer treatment not given and misrepresentation of fact, wrong documentation". The document reflects that Torre did not administer the nebulizer treatment to the patient on 4/29/13, and the patients daughter raised a complaint to the Department about the treatment not being given. Torres noted in the EMAR that the treatment was not given, at 10 a.m. and 4 p.m. since the patient was not available. However, the supervisor verified with the nurse Tamara Yakubava, that the patient was in the room at these times.

Verrette was asked whether or not this was "severe," and he replied no because the patient did not go into distress or have any problems. According to Verrette, if that had occurred, the disciplinary action "would have possibly jumped to a suspension or a written warning."

On Nov. 13, 2013, Torre received counseling for failing to be helpful to colleague, while Torre was acting as Lead RT. On Feb. 3, 2014, Torre was issued verbal counseling for using profanity in the presence of a supervisor and three employees. On March 23, 2014 Respondent issued Torre another verbal counseling for using profanity, during lunch in the staff office in the presence of 4 employees. The document reflects that Torre was verbally counseled on several occasions and emphasized to be cognizant of the language he uses at all times.

On April 10, 2014, Respondent issued Torre a written warning for "false Documentation 1 Accurate shift report." The document reflected that Torre falsely documented that he competed a BIPAP surveillance check on a patient at Dioam, when he actually completed it hours later, at 6:01 p.m. The documented also lists Torre's previous counseling and/or Disciplinary Actions, listing his 4/30/13 verbal warning and his Counseling's on 11/13/13, 2/3/14 and 3/23/14, as detailed above.

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On November 6, 2014, Torre received a verbal coaching for failing to follow Respondents sick call notification procedure. Torre is still working for Respondent.

#### DARRYL MONTANA

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Darryl Montana, another RT employed by Respondent, was issued a verbal conversation and counseling on 5/27/14 for inattentiveness, based on a complaint from a nurse manager, that Montana had not answered his work telephone, when she tried to reach him about a transport that needed to be done.

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On July 16, 2014 Montana receiving another verbal counseling for failing to answer his work telephone. Montana explained to the supervisor that the ringer volume on his phone was low, and he had forgotten to turn up the volume. The document reflects that Montana was verbally counseled and emphasized to be more aware and cognizant. It added that Montana stated that he was sorry.

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On July 30, 2014 Respondent issued Montana a verbal warning for failing to forward his work telephone. On August 18, 2014, Respondent issued Montana a verbal counseling for announcing, in the presence of another employee and Ansari that he had never done the particular procedure before. The counseling reflected that this created a "tenuous environment," and added that Montana was counseled in private, and "emphasized to positive language with confidence."

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On February 3, 2015, Montana was issued a counseling for leaving his work telephone in his assigned area, when he was elsewhere. The document reflects that "the expectation is for Mr. Montana to maintain his hospital communication device on hand at all times". When cross examined as to why Montana received counseling after his last disciplinary action regarding his work telephone was a verbal warning, Verrette responded that it was because six months had passed and that Montana was doing a "little bit better." When it was pointed out to Verrette that six months had also passed between Young's Verbal Warning and his written warning, regarding his work telephone, Verrette answered that the counseling was a mistake, and an "oversight," and that all honestly this probably could have warranted a written." Montana is still employed by the Respondent.

## **FERNANDO SATO**

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Fernando Soto also works for Respondent as an RT. On October 14, 2012, Respondent issued Sato a counseling session for failing to document that he provided a nasal pillow to a patient, and for responding in an argumentative manner to his supervisor when questioned about it. On December 20, 2013 Respondent issued Sato another counseling session for using profanity in the staff office, and for violating Respondent's "We Care Values".

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On November 7, 2014, Soto received a coaching for leaving his phone unattended while it was charging. The document reflected that the supervisor told Sato that the phone should be on him at all times. Sato apologized and said he forgot the phone when he left it charging. No calls or patient related incident occurred during this time period. On Feb. 4, 2015, Respondent issued Sato a coaching, and a counseling.

The counseling was for "Procurement of Hospitalist ABG." It reflected that a hospitalist physician had contacted Sato about assistance in procuring arterial blood was for a patient. Sato advised the doctor to have a nurse on the floor assist. When spoken to by Ansari about the situation, Sato informed him that he had advised the hospitalist and or Nurse to make an attempt to procure the arterial blood gases, prior to verifying that the Doctor was a hospitalist who was covered under our services for obtaining arterial blood gases. Ansari was able to find another RT to obtain the blood gases without any further delay to obtain the arterial blood order as per the physician order.

The document reflects that it is the expectation and responsibility of the RT covering his area to procure blood gases for hospitalists covered under any service. Sato was non-compliant with this Department policy.

The coaching related to this incident, and reflected that Sato was coached regarding direct communication with colleagues when requesting for help. With respect to the above described incident involving the blood gas request, Sato gave his supervisors number to the hospitalist, but did not communicate himself with his supervisor about his hospitalist's request for help. Sato was requested to communicate directly with the supervisor or lead RT to make them aware of the situation. Sato is still working for Respondent.

## FRED ROBINSON

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Fred Robinson is a per diem RT. On February 13, 2014 he received a counseling for failing to provide his availability under Respondent's guidelines. On the same day, Respondent issued Robinson counseling for failing to complete documentation. On March 20, 2014, Robinson received a verbal coaching for failing to engage in direct and effective communication with and submitting documents directly to supervisors. On May 1, 2014 Robinson received a counseling for failing to keep his work telephone on his body. Robinson had left the phone unattended in the staff office, when he was chatting at the computer. Ansari informed Robinson that he must maintain his hospital phone on his person at all times as per policy because this is a communication method in our institution. On May 1, 2014, Respondent also issued Robinson a verbal coaching for failing to contact the correct head RT (Supervisor) Director on duty. Verrette was questioned as to why Robinson did not receive progressive discipline for his second communications issues within two months. He replied that Robinson was a per diem employee, so he was simply taken off the schedule. Verrette then stated that Robinson was still on the schedule, but is not getting any shifts and Respondent is "weaning him off of it."

## YANG SHI

Yang Shi, an RT, received a coaching on July 11, 2014, stating that RT should seek assistance in the following order: colleague, head therapist, supervisor, assistant administrative and director. The coaching was titled, "Awareness of Colleagues Effective Teamwork". On August 1, 2014, Shi received a coaching for walking away from Ansari while he was speaking to her regarding a failure to update the board. The document states "Miss Shi did not communicate directly with a supervisor. Miss Shi did no uphold the WECARE values by cutting me off and walking away before I

could finish my statement". On August 8, 2014, Verette was not involved and aware of this coaching status which was given by Ansari.

On August 8, 2014, Shi was issued a coaching by Ansari, with Verette present, in response to a complaint by Darryl Montana. According to the document, Montana had reported that Shi was rude and unprofessional while he was trying to learn in the NICA. Shi was interviewed and claimed that Montana had "misconception." Shi was asked to meet with Montana, Verrette and Ansari, and she stated that she felt uncomfortable with three men in room. Verrette decided not to pursue any further clarification. Shi is still employed by Respondent.

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#### **ALIMUDEEN NAUSRUDEEN**

Alimudeen Nausrudeen was a per diem RT. On Aug. 23, 2013, received her a counseling for non-compliance of Respondents and Hygiene Policy. On Nov. 22, 2013, Nausrudeen received a coaching for incomplete documentation. On 6/17/14, Respondent issued Nausrudeen a counseling reflecting three incidents of incomplete documentation on 12/27/13, 6/12/14 and on 6/19/14. This document, which is entitled "Incomplete EMR Documentation," also listed on the bottom, Prevision Coaching Counseling's; and listed Nausrudeen 2/23/13, Counseling and his 11/27/13 Coaching. According to Verrette, generally when there is a prior discipline or counseling, it will be listed on the form, when a subsequent discipline or counseling is issued.

With respect to the 6/17/14 counseling, Verrette testified that Ansari brought the matter to his attention, and informed Verrette that he intended to issue Nausrudeen a counseling. Verrette said fine. They did not discuss giving Nausrudeen any other discipline such as a verbal or written warning for this conduct.

On 7/10/14, Ansari issued a conversation with Nausrudeen. This document reflects that when Ansari was readjusting assignments due to a sick call, Nausrudeen "inappropriately commented 'under his breath' "why did you not call Rich to find out?" Ansari stated to Nausrudeen that the comment was "inappropriate and that there was no need to call Verrette because Ansari was not aware of the sick call anyway. This was disruptive behavior."

According to Verrette, Nausrudeen was terminated by Respondent sometime in April or May of 2015, for excessive absenteeism and sick calls. Verrette called Nausrudeen on the phone and explained the circumstances, gave him a list of his absences, and told him that Respondent would not need his services any longer. Respondent did not send out a termination notice, since he was a per diem employee.

### SAMUEL AYIDE

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Samuel Ayide was an RT employed by Respondent, and on 4/24/13 he received a counseling, Subject: Programming/Forwarding Spectra Link Phones. The document reflects that a nurse was unable to reach Ayide for two hours in order to assist with a patient. The nurse stated that when she was calling to try to reach Ayide, the caller ID displayed another therapist, who had worked the previous day shift. Further, Ansari had called the area; Joseph Mathew answered the phone,

who had covered the area the previous day. Ayide stated that he had programmed his assigned areas at the beginning of the day shift and did not accept responsibility for not programming his spectra at the beginning of the shift. The document reflects that Ayide was counseled on the importance of following Departmental procedure to program his assigned areas at the beginning of the shift.

Verrette was "asked what happened there," in connection with this incident. Verrette testified that he had received a call from a nurse manager, who informed him that an RT and another staff individual were "making out" in the staff lounge. The nurse manager reported that she instructed the employees that this was a staff lounge and it was inappropriate to engage in that conduct. The response according to the nurse manager was "go away, leave us alone." Verrette testified that investigated and found out that the RT involved was Samuel Ayide.

On May 20, 2013, Ayide was discharged. The Nature of Offense was "Conduct Subsequent to Disciplinary Action and Incomplete Documentation of Medication Nebulizer EMAR." The document refers to Ayide displaying conduct in non-compliance with the We-Care Values of the Institution. It refers to a complaint being filed and an investigation conducted, and Ayide was positively indentified as the individual involved in the complaint. This appears to be a reference to Verrette's testimony about Ayide being caught "making out" in the staff lounge with another individual, and their reaction to the instruction by the nurse manager to cease that behavior.

The document also reflects that Ayide failed to sign off on the EMAR for medication nebulizer treatments as per hospital policy, resulting in red boxes for the current calendar year. It lists 7 instances from March 20 through May 4, where Ayide engaged in this conduct.

According to Verrette, Ayide was discharged for his conduct reflected in the discharge notice, as well as for previous conduct set forth in the counseling.

### **Carl Molines**

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On May 21, 2012, Carl Molines, an RT was issued a written warning for forgetting to come into work, and reporting to work only after being called numerous times when he finally responded. The supervisor told Molines that he had let the team down and this created some problems among the staff because some staff did not know he was at work, and assignments were not distributed properly. The document reflects Molines was given a written warning "for this serious offense."

On April 19, 2013, Respondent issued Molines counseling for a documentation error. On August 20, 2013, he received a counseling for "oxygen sensor negligence." The document reflected that Molines neglected to change an oxygen sensor, but instead disabled it. The document reflects further that "this could have resulted in a potential risk for the patient. Also Mr. Molines neglected to report it to the next shift."

Verrette was asked about this incident. He was not involved in it or, aware of it, as it was issued by Cespedes. Nonetheless, Verrette asked if disabling the oxygen sensor is severe? He responded, no, no, Verrette noted that the patient could go into distress, but that there a lot of other

monitoring devices that can determine if the patient is in some form of distress. Molines is still working for Respondent.

# Jenny Alba

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Jenny Alba an RT received a verbal warning on 12/3/12 for documentation errors. The document sets forth 10 separate instances of documentation errors from 2/4/12 through 9/27/12, and reflects that she was coached on these deficiencies as they occurred. It goes on to say "It is imperative that all departmental documentation and clinical records be accurate. Nonetheless any kind of documentation errors will not be tolerated."

On October 21, 2014 Alba received a verbal counseling for lateness. On November 25, 2014, Alba received a written warning for lateness reflecting 19 occurrences of lateness between 8/18/14 and 11/20/14. The document reflects that Alba is expected to correct the situation and that continuation of tardiness will lead to progressive discipline.

On February 10, 2015, Alba was issued a document entitled final written warning documenting six incidents of lateness between 1/5/15 and 2/7/15. Both Verrette and Ernst about this action and why she only received a "final written warning", rather than a suspension were asked for her conduct. Verrette answered that he consulted with HR on this action, and that Alba's problems with lateness was related to the conversion to the eight hour shifts, and that Alba had a child and they lived over the bridge and she had difficulty coming in on time. According to Verrette he consulted with HR and since these were no patient care issues, Respondent decided to give her one more chance. Verrette added that Alba has corrected the problem, and there have been no more lateness issues with Alba since then. Ernst testified that final written warnings are used for not serious kinds of things and "we feel that they are a good overall employee". Thus, Respondent wants to give them one more final warning before terminating an employee. Alba is still employed by Respondent.

# G. CONVERSATION BETWEEN VERRETTE AND MELISSA CHAN

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Melissa Chan is and was Counsel for charging Paris Young in the instant case. She appeared at trial and represented Young. On June 17, 2015, during a lunch breaks at the trial, Verrette approached Melissa Chan in the Hearing Room at 120 West 45th St., New York, NY. Verrette introduced himself, and asked her if she was the daughter of Jacob Chan. Melissa Chan replied "yes." Verrette responded "Oh – he's great. I'm sure that you knew." Melissa Chan responsed "yes I know."

According to Melissa Chan, Verrette then added that he's worked with us for many years. So you know he's still employed with us." Verrette denied that he made either of the above two comments to Chan.

Verrette further testified that he had an excellent relationship with Jacob Chan, who has worked for Respondent, at least since Verrette began working for Respondent in January of 2014. According to Verrette, Jacob Chan talks about his daughter to him, and he had heard that Melissa Chan is related to a friend of Young. Thus Verrette put two and two together, and thought that she

might be Jacob Chan's daughter. Verrette asserts that he was just trying to be friendly in talking to Melissa Chan, emphasizing his good relationship with Jacob Chan, and they talk about Chess and history, and that they have an excellent working relationship.

### **III. ANALYSIS AND CONCLUSIONS**

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# A. CONDUCT OF RICHARD VERRETTE

The Complaint alleges and General Counsel contends that Respondent committed a number of independent violations of Section 8(a)(1) of the Act, by the conduct of Verrette.

Most of them allegedly occurred during his conversation with Webb on July 7, 2014. General Counsel asserts that Verrette committed three separate violations of section 8(a)(1) of the Act by his comments to Webb during their meeting. They are unlawful interrogation, creating the impression of surveillance and implied threats of reprisal because of employees protected concerted activities.

The interrogation violation, according to General Counsel occurred when Verrette asked Webb during their meeting on July 7, 2014, "Why don't you guys communicate with me." However, I cannot agree with General Counsel's contention that this comment can be reasonably construed as a coercive interrogation. First, I agree with Respondent that Verrette's comment was more of a rhetorical question, and not coercive. *TOMA METALS* 342 NLRB 787, 789 (2004).

More importantly, even if it is construed as an interrogation, it is concluded that it cannot reasonably be construed as relating to any protected concerted activity of Webb or any other employee. As I have detailed above in my findings of fact, the discussion between Verrette and Webb was centered around Webb taking an unauthorized sick leave day, when she had twice been denied by Respondent permission to take a personal day, when she was not sick. Verrette was clearly upset about Webb's conduct, he characterized it as saying "FU" to the Department, and in fact suspended her for engaging in this conduct. Thus, his annoyance at Webb and his criticism of her did not relate to any alleged protected concerted activity by her, three months earlier, but her recent conduct, which precipitated her suspension.

While Verrette did make reference to having seen Webb and Pierre at HR in April, and did then add, "when didn't you communicate with me directly", I find the record insufficient to establish, that this remark related to any protected concerted activity. I credit Verrette that he did not know that either Webb or Pierre, were involved with the petition or that they went to HR that day to present the petition to Ernst. I credit Verrette that he believed that Webb was probably at H.R. in April of 2014 to protest her recent furlough, which had just expired.

I note interestingly, that in response to Verrette's question, Webb responded that he should look at the way he is talking to her and added "this is the reason why I don't communicate with you" This response by Webb, which makes no reference to or mention of her protected activity of bringing the petition to Ernest in April, but emphasizes that she didn't like the way Verrette was talking to her, as the reason why she didn't communicate with him, demonstrates that she did not believe that the questioning related to her protected conduct. The critical comments made by

Verrette that angered Webb related to her conduct in taking unauthorized sick leave, and its effect on the department and had nothing to do with any protected activity engaged in by Webb.

I therefore conclude it cannot be reasonably concluded that Verrette asking Webb why didn't she communicate with him, had any relation to her protected concerted activity in April of 2004, and I shall therefore recommend dismissal of this allegation of the complaint.

General Counsel asserts that Verrette's comments that he had seen Webb and Pierre coming out of Human Resources in early April of 2014, created the impression that her protected concerted activities were under surveillance.

The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether "under all the relevant circumstances reasonable employees would assume from the statement in question that their protected activities had been placed under surveillance" *Pressroom Cleaners*, 361 NLRB No. 57 (2014); *Frontier Telephone of Rochester* 344 NLRB 1270, 1276 (2005).

General Counsel argues that Verrette's comments to Webb that, she was "manipulative and sneaky," and "that you think I didn't know about your secret trips to Human Resources.? I caught you and Sophia red-handed at the office" reflect that Verrette believed that Webb was doing something underhanded, and that he was watching her. Thus a reasonable employee would construe Verrette's statements to convey that Respondent was surveilling employees protected activities. *The Continental Group*, 353 NLRB 348, 350 (2008). I disagree.

First of all, I did not credit Webb's testimony that he told Webb "you think I didn't know about your secret trips to Human Resources. I caught you and Sophia red-handed at the office." While I did credit Webb that Verrette called her "manipulative" and "sneaky", I found that those comments had no relation to any protected activity of Webb or to his seeing her at HR in April, but was in reference to her conduct of talking sick leave when she was not sick, to extend her vacation, for which she was suspended.

Moreover, as I previously found in connection with the interrogation allegation, Verrette was not aware that Webb or Pierre were at HR in April to present the petition to Ernst or that they were engaging in any protected concerted activity at that time.

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Finally, it is not reasonable for Webb to conclude that Respondent was monitoring her concerted activities. Webb by her own testimony established that Verrette ran into her by accident on her way out of HR, as he was going into the office, and they exchanged pleasantries on that day. There is simply no basis to conclude that Webb reasonably believed that Verrette was surveilling her concerted activities. Her activities were conducted openly on Respondent's properties, and there can be no reasonable inference that Verrette obtained any information through unlawful surveillance. *Pressroom Cleaners*, supra, *Frontier Telephone of Rochester*, supra.

I shall therefore recommend dismissal of this allegation in the complaint.

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The third violation allegedly as committed by Verrette, during his conversation with Webb, was an implied threat of reprisals to employees because they conveyed concerns to management. General Counsel argues again relying on Verette's comments that Webb was "manipulative and sneaky" and that he had caught her and Pierre red handed in the office, that implied that Webb was doing something wrong, it would be reasonable to assume that Verrette's directive to communicate with him directly in the future, lies a threat of an unspecified signal if she did not. I cannot agree.

Initially, as a stated above, I did not credit Webb's testimony that Verrette told her that he had caught her and Pierre "red handed at H.R. While I did credit Webb that Verrette told her that she was manipulative and sneaky, I found above that those comments related to her recent conduct relating to her sick leave problems, and not to any concerted activity back in April.

While Verrette did make the comment to Webb, "why didn't you communicate with me?", I find no implied threat based on any protected concerted activity of Webb or any other employee. I conclude that Verrette's, inquiry as to why Webb did not communicate with him directly, did not either explicitly or implicitly threaten adverse consequences for engaging in protected activity but was simply a reminder to Webb that Respondent had a procedure in place to address employee concerns. (Going through the chain of command, and speaking to Verrette). See Sam's Club\_342 NLRB 620, 621 (2004). Statement to employee by supervisor reminding him that employer had an open door policy and suggested that he and the supervisor could not address employee concerns unless they were brought to his attention, found not to explicitly or implicitly threating adverse consequences for engaging in protected concerted activities.)

Accordingly, I shall also recommend dismissal of this complaint allegation.

General Counsel also alleges that during the course of Verrette's meeting with Young on August 20, 2014 Verrette called Young insubordinate and belligerent, and said that he had made the transition impossible. Further General Counsel argues that as Young made an effort to leave Verrette told him that this will lead to progressive discipline against Young and it will not stop here. Therefore, it is contended that Verette interfered with restrained and coerced Young in the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

Once again I cannot agree with General Counsel's contentions. While Verrette did state that Young was insubordinate and belligerent, these comments had no relation or connection to any concerted activity of Young, but to Young's conduct earlier in the morning with Ansari, and with Verrette during this meeting. While Verrette did refer to Young making the "transition impossible" I do not find that this remark related to any concerted protected activity of Young. Rather, as I have related above, the comment was in connection with the increase in sick calls that was caused by the transition to the 8 hour shifts, and that Young's conduct with Ansari earlier in the morning made things more difficult for Respondent, in view of a sick call for that day.

I find that the statement made by Verrette about the possibility of progressive discipline for Young, had absolutely no connection to any protected concerted activity by Young. I note that

Verrette made no reference to Young's protected concerted activities of circulating the petition or of presenting the employees proposal to Respondent at the meeting in April, 3 months earlier. I also note that there is no evidence that Verrette was aware of either of these actions by Young and I credit Verrette's testimony that he was not aware of or informed about Young's role in this activity. Indeed this testimony is confirmed by Respondent's other witnesses, and implicitly by Webb since she told Ernst that the employees did not want management i.e. Verrette to know about the petition, and in fact as a result of the petition was not shown or distributed to Verrette. Moreover Verrette was not present at the meeting when Young presented the employees proposal to Respondent.

The evidence demonstrates that Verrette's comment to Young about progressive discipline, related not to any concerted activity of Young but solely to Young's insubordinate conduct at the August 20 meeting of walking out of the office, while Verrette was still talking to him, about his earlier misconduct and refusing to return even after Verrette asked him to come back. The meaning of Verrette's comments was plain, unless he returned to the office and continued the discussion with Verrette, progressive discipline would result. *Bridgestone Firestone of South Carolina*, 350 NLRB 526, 529 (2007) (statement by supervisor that she would recommend discharge unless charging party answered his questions, would not have been reasonably understood as a threat to discipline because of his union activities. Meaning of statement was plain, unless he denied that he used profane language attributed to him, supervisor would recommend his discharge).

Accordingly, I shall recommend dismissal of this allegation of the complaint.

The final allegation relates to Verrette's comments to Melissa Chan attorney for Young, on June 12, 2015. Jacob Chan is Melissa Chan's father, and is employed by Respondent as an RT under Verrette's supervision. Verrette had heard that Melissa Chan is related to a friend of Young. He therefore put two and two together and thought that she might be Jacob Chan's daughter. He approached Melissa Chan in the hearing room on a break, introduced himself asked whether she was Melissa Chan and said to "her that her father is great, he is sure she knows". Melissa Chan replied "yes thanks."

According to Melissa Chan, Verrette then added that "he has worked there for many years. So you know he's still employed with us." While Verrette denied making the latter two comments, for the purposes of this discussion, I shall credit Melissa Chan that Verrette added these remarks.

However, I do not agree with the assertions of General Counsel and Charging Party, that Verrette's comments can be reasonably construed as threatening discharge or other adverse consequences for Jacob Chan, because Melissa Chan is representing Young.

I credit Verrette that he had an excellent working relationship with Jacob Chan, and his intent is talking to Melissa Chan was only to be friendly.

I find it unreasonable to believe that Verrette would be upset about Chan representing Young that he would threaten to discharge her father, with whom he had had an excellent work relationship merely because his daughter chose to represent Young.

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I therefore, shall also recommend dismissal of this allegation.

# B. The Suspension and Discharge of Paris Young

To establish an unlawful discrimination against an employee, the Board utilizes the analysis articulated in *Wright Line*, 251 NLRB 1083 (1985), approved in *NLRB v. Transportation Management*, 462 U.S. 393(1983). The General Counsel must establish that the employees protected conduct was a motivating factor in the employee's decision to take action against them. *Gaylord Hospital*, 359 NLRB No. 143, ALJ slip op. at 14 (2013). If the General Counsel is successful, the burden shifts to the employer to show that it would have taken the same action even in the absence of protected conduct. *Wright Line*, supra, *Septix Waste Inc.*, 346 NLRB 494, 496 (2006).

Various components are utilized by the Board in determining whether the burden of proving that the protected conduct was a motivating factor in the decision, has been met. They include whether the employee was engaged in protected conduct, whether the employer had knowledge of the protected activity, whether the employer bore animus towards the employees protected activity, whether that animus contributed to the decision to discipline the employee, and the timing of the discipline in relation to the protected conduct. *Praxair Distribution*, 357 NLRB No. 91 fn. 2 (2011). Central Valley Meat, 346 NLRB 1078, 1093 (2006); *Director, Office Workers' Comp Programs* Greenich Collieries, 512 U.S. 267, 268 (1994), clarifying *NLRB Transportation Management and Wright Lines*, supra.

The *Wright Line* analysis is applicable to both the suspension on August 20, 2014 and the discharge of Young on September 3, 2014. With regard to the suspension, Respondent argues that in fact Young was not suspended on August 20, and merely put on leave pending the results of the investigation into his conduct. Therefore it contends that the August 20, 2014 action was not an adverse employment action and that the act of taking Young off duty is, therefore subsumed as part of the ultimate decision to terminate Young's employment.

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Although Respondent did not characterize Young's removal from duty, as a suspension, in effect it was, since he was involuntarily placed off duty and had no work for two and a half days, (before his scheduled vacation). He was not paid for these two and half days, for which he was not working.

I therefore conclude that Young was suspended on August 20 that this was an adverse employment action, and, it must be evaluated separately from the ultimate discharge on September 3, 2014.

The first issue is whether Young engaged in protected concerted activity. There is no dispute that he did so here. Young was involved in the preparation and circulation of the petition submitted to Respondent requesting a meeting to discuss alternatives to Respondent's proposal to change shifts. More importantly, when the meeting and held, it was Young who presented the employees alternative

proposal and explained it to Respondent. The above conduct by Young is clearly protected concerted activity, and Respondent does not dispute this conclusion.

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Respondent does vigorously dispute the issue of Respondent's knowledge of Young's protected concerted activity, which lead to General Counsel's request to submit a reply brief dealing with that contention of Respondent, which as related above, I granted.

In this regard Respondent argues that Verette was the decision matter with regard to the disciplines, and since he didn't know about Young's protected concerted activity, the element of knowledge has not been established requiring a dismissal and a finding that a prima facie case has not been made. *Reynolds Electric* 342 NLRB 156, 157 (2004) (lacking such knowledge, the decision maker cannot discriminate against an Employee for engaging in protected concerted activities). *Tomatek, Inc.* 333 NLRB 1350, 1355 (2001). ("It is axiomatic that the employer could not have been motivated by the employees protected activity if the employer did not know about such activity"). Respondent argues that Verrette the decision maker did not know about Young's protected conduct, nor did Ansari, since they so testified, and Godfrey confirmed that she did not provide the petition to Verrette, nor inform him that Young had presented and explained the employee proposal to Respondent at the meeting.

However, a supervisor's or agents knowledge of union or concerted activities is imputed to the employer, unless credited testimony establishes the contrary. *Coastal Sunbelt Produce* 358 NLRB 135 fn. 3 (2013); *Gestamp South*; South Carolina 357 NLRB No. 130 slip op. at 10 (2011); *Harriscorp* 269 NLRB 739, 234 (1989) (Supervisor who recommended termination aware of concerted activity); *GATX logistics* 323 NLRB 333 (1997); (knowledge of supervisor imputed to Respondent, although he didn't make the decision to discharge discriminatee).

Here, Orlando, Godfrey and Ernest, all supervisors and agents of Respondent, were clearly aware of Young's protected concerted activities, having been present at the meeting when he explained and discussed the employer's alternative proposal. Since Orlando made the decision to suspend Young, and Ernest jointly decided along with Verette to discharge Young, knowledge by Respondent of Young's protected concerted activity has been established. *Springfield Air Center* 311 NLRB 1151 (1143). (Supervisors knowledge of union activity discriminate attributed to Employer, since supervisor had direct input into the decision to discharge him. Accord, *Grand Rapids Die Casting v. NLRB* 831 F2d at 112, 117-118 (6th Cir. 1987).

The two other components of General Counsel's prima facie case are timing and animus, towards Young's protected concerted activities.

With respect to timing, the Board has held that where the discrimination occurs shortly after the discriminatees protected activities occurred and were known to the Employer, this represents significant evidence of an unlawful motivation. Such coincidence is time between Employer's knowledge of the employees protected activity and his discharge is strong evidence of unlawful motive for the discharge. *Trader Horn*, NJ 316 NLRB 194, 198 (1995).

However, here Young's protected activity occurred back in April of 2014, over four months from the alleged discrimination against him on August 20, 2014 and September 3, 2014.

This gap in time between Young's protected activities and the alleged discrimination against him is too remote to support an inference of a connection between the alleged discrimination and his protected conduct. *Central Valley Meat*, <u>supra</u>, 346 NLRB at 1092. (Alleged discrimination 6 months after charging party engaged in union activity, and 2 months after he filed lawsuit, representing concerted activity); *Rockland Bamberg Print Works*, 231 NLRB 305, 306 (1977) (Discharge too remote in time from support of union in election 5 months earlier); *Thomas Brown Shoes*, 257 NLRB 264, 268 (1981). (Insufficient showing of antiunion motivation where protected conduct occurred almost 6 months prior to discipline); *Geo Hamilton Inc*. 289 NLRB 1335, 1340-1341 (1988) (Discriminatees participation on union negotiating team, too remote in time to be linked to layoff, 11 months later.) *Irving Trucking Inc*. 223 NLRB 618 (1984) (termination of union supporters 5 months after unsuccessful union drive, insufficient evidence probative of unlawful motive; *Qualitex, Inc.*, 237 NLRB 1341, (Discharge over 4 months after election where C.P. was observer, had active role in union campaign).

General Counsel seeks to get around this deficiency in its case, by arguing that the timing supports a finding of discrimination, inasmuch as Young had a good record throughout his career at Respondent, and that when Respondent discovered his protected activity of signing the petition, it suspended him on April 9. Thus General Counsel argues that the element of timing is established. I cannot agree.

The suspension of Young on April 9 has not been alleged as discriminatory, and I cannot and do not find that it was discriminatorily motivated.

Further, the primary evidence of Young's protected conduct, occurred on April 16, when he presented the employees proposals, a week after this suspension.

Therefore, I reiterate my conclusion that the only alleged discrimination to be considered are Young's suspension and his discharge on August 20 and September 3, respectively and these events were too remote in time to support on inference of discrimination based on his April protected activity.

Turning to the final, and indeed the most important element of General Counsel's case which I find to be missing, which is the existence of animus by Respondent towards Young's protected concerted activities.

I have dismissed the allegations in the complaint that General Counsel relies upon to establish animus, such as the alleged interrogation, creating the impression of surveillance and threats by Verrette. I also find that none of the statements made by Verrette during these conversations support animus towards Young's protected concerted activities. As noted Verrette's comments to Young on August 20 concerning the possibility for employee discipline related solely to Younger's conduct at the meeting's walking out of the office, when Verrette was speaking to him, and cannot in any way be attributed to Young's protected conduct four months earlier.

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Similarly while General Counsel argued that Verrette's comments about Young making the transition impossible, related to his protected activity, I cannot agree. I have found that Verrette's remarks about Young making the transition impossible or difficult related to Young's conduct earlier in the day with Ansari. There had been a sick call that day and Young's conduct earlier in the day in dealing with Ansari had enraged Ansari, resulting in an e-mail from Ansari to Verrette complaining about Young's conduct. Verrette explained to Young at the meeting that he had made things difficult that morning in his dealing with Ansari, and in view of the sick calls, it was important to act properly with his supervisor in discussing Young's concerns about his workload.

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None of these comments had any relation to Young's conduct four months earlier, and cannot be construed as animus towards such activity.

In fact the evidence overwhelmingly demonstrates that Respondent did not have any animus towards the protected concerted activity of Young, or indeed to the protected concerted activities of any of other employees participating in the petition including Webb and Pierre. The credited evidence revealed that Respondent welcomed the proposal. It agreed to meet with the employees, listed to their proposal, (explained by Young) and carefully considered it. Indeed the evidence indicates that respondent was favorably disposed to agree to one of the employees' proposal for, a 13<sup>th</sup> shift, but the overtime issue prevented them from agreeing to it. Respondent obtain a second opinion from counsel, hoping that the overtime issue could be circumvented and it could go along with the employee's proposal to save money.

Respondent also postponed implementation of their own and plan, after rejecting the employee's proposal, when it was determined that overtime issue would preclude sufficient savings, if it implemented the 13<sup>th</sup> shift.

I agree with Respondent that no animus was established towards Young's protected activities four months earlier, and the absence of such evidence is fatal to General Counsel assertion that animus toward Young's protected activity was a motivating factor in Respondents decisions to suspend and discharge him. *Praxair Distribution, Inc.,* 357 NLRB No. 91 fn.2 Slip at I, ALJD Slip op at 11-12 (2011)(Management took complaints by employees seriously, no animus established toward such activity and discharge motivated by subsequent events); *American Federation of Teachers of New Mexico* 360 NLRB No. 59, NLRB slip at 11-12 (2014) (Requisite animus necessary to establish that charging party selected for layoff because of his protected activity, is missing); *Children's Services International*, 347 NLRB 67,69 2006) (No union animus supporting conclusion that Employees layoff selection motivated by union animus.)

I agree with Respondent that the evidence demonstrates that Young's protected conduct, played absolutely no role in his suspension and discharge, and they were based solely on the events of August 20, 2014, and Young's conduct on that day towards Ansari and Varrette, plus Respondent's discovery during the investigation of Young's conduct that he had not performed the required medications for these and vent checks for eight patients which Respondent viewed as abandonment of patients.

None of Young's conduct on August 20, 2014 even arguably can be construed as protected concerted activity, and I find that he was suspended and ultimately discharged solely based on his conduct on that date, and was not in any way motivated by protected concerted activity four months earlier.

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In this regard General Counsel argues that Respondent's alleged grounds for disciplining Young were baseless and pretextual, so even absent direct evidence of animus, unlawful motivation can be found, that the true motivation was animus against protected activity. *Cincinnati Truck Center*, 315 NLRB 354, 355 (1994). Indeed the Board has even in the absence of direct evidence of animus, in appropriate cases, inferred animus from circumstantial evidence, including evidence that the employer's stated reason for its action was a pretext that is either false or not relied on. *Diamond Electric MFG Co.* 346 NLRB 857, 856 (2006); *Whitesville Mill Service Co.* 307 NLRB 437 (1992); *Shattuck Denn Mining Corp.* v. *NLRB*, 362 F.2d 466 (9th Cir. 1966).

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In support of its assertion that the reasons asserted by respondent for disciplining Young were pretextual and baseless, Respondent relies principally on its evidence of "disparate treatment" of a number of employees, as described more fully in the facts above.

While my examination of the disciplines introduced into the record by General Counsel, does

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demonstrate some inconsistency and raises some issues, as to why Respondent decides to issue a coaching or a counseling concerning some misconduct as opposed to a verbal or written warning or even a suspension, I do not find that the evidence is sufficient to establish sufficient disparate treatment, to warrant a conclusion of pretext. I note that in none of the examples relied on by General Counsel, did the employees who were not terminated, have a similar disciplinary record to Young, that followed Respondent's progressive disciplinary system. That is Young received a verbal warning, written warning and a suspension all before his final disciplines, of a temporary suspension on August 20 and ultimate discharge on September 3. It is significant to note that the three prior disciplines to Young all occurred prior to his exercising any protected concerted activity in early April of 2014. I also note Young's own testimony that in his opinion Ansari and Verrette have applied Respondent's disciplines against him unfairly, because of issues with Ansari stemming from a dispute between them at another job. This of course negates any inference that Respondents actions were motivated by his protected activity, which did not commence until April.

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I also note that Samual Ayide's employment was terminated by Respondent for improperly documenting medical records, even though he had no disciplinary history other than a prior counseling.

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I further note that Webb also received a written warning, a verbal warning, followed by two verbal counseling's, and another verbal warning, before receiving a 2 day suspension for excessive absenteeism and abandonment of her shift. Thus she was not terminated but merely suspended for engaging in similar conduct to that of Young's abandonment of her shift.

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therefore conclude that the evidence of disparate treatment cited by General Counsel is insufficient to establish pretext or that Respondent did not rely on the conduct allegedly committed by Young to suspend and discharge him on August 20 and September 3 respectively. *Diamond MFG*,

supra 346 NLRB at 259 (ALJ erred in finding disparate treatment, because, unlike his proposed comparators, discharged employee had a history of discipline). *Hoffman Fuel Co. of Bridgeport* 309 NLRB 327, 329 (1992). (No disparate treatment existed, because other employees did not have disciplinary history like the discharged employee.)

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Here, I find that the evidence supports the conclusion that Respondent suspended Young on August 20, because of his belligerent misconduct and insubordination with Ansari and Verrette on August 20, as detailed in the e-mails to Orlando and that Orlando decided to take Young off duty on that day pending further investigation into his conduct. I note that Young had instead of returning to work after walking out of Verrette's office went to security, accused Verrette of threatening him and, would not return to work. In those circumstances, particularly since both Orlando and Ernst were not at work on August 20, it was reasonable for Orlando to decide to take Young off duty, pending the results of the investigation. There is simply no basis to conclude that this decision was pretextual or that it was in any way based upon or related to Young's protected activities, which occurred four months before.

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Once the investigation was completed, it was determined by Respondent that Young had not given medication as prescribed to three patients, and that he failed to do vent checks for 8 of his 9 patients. Respondent characterized this conduct by Young as abandonment of his patients and discharged him for engaging in that conduct as well as his insubordination earlier in the day on August. 20 with Verrette, and Ansari plus his past disciplinary history of verbal warning, written warning and suspension.

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General Counsel argues that Respondent cannot logically assert that Young abandoned his patients, since Respondent knew where he was at 10:15 AM, and did not order him to go back to work. However the abandonment of his patients took place prior to 10:15, when he was working and he failed to perform his assigned functions.

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General Counsel argues that Young did in fact perform all 9 vent checks since he testified that he did, but merely did not have time to enter them into the records. I have my doubts about Young's testimony in this regard, particularly in view of the fact that he failed to assert to Orlando or to anyone at Respondent, that he had completed those vent checks.

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Nonetheless, even if I were to credit Young that he completed all the vent checks, that would not be dispositive, since Respondent clearly had a reasonable belief that Young had not performed those vent checks based on the records and the reports that it secured from the employees who took over the care of Young's patients. *Diamond Electric Mfg. Co.* 346 NLRB, 857, 859. (Respondent acted on reasonable belief that charging party's conduct warranted discharge, *DTR Industries* 850 NLRB 1132, 1135 (2007) (Reasonable belief that employee committed offense).

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I conclude that Respondent had a reasonable belief that Young had abandoned his patients on April 20, 2014, and that it acted on that reasonable belief, in deciding to discharge him on September 3, 2014, for this reason, plus his other misconduct on August 20, as well as his prior disciplinary record.

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Accordingly, I shall recommend dismissal of these allegations in the complaint.

On these findings of fact and conclusions of law, I use the following recommended, <sup>2</sup>

# **ORDER**

The complaint is dismissed in its entirety.

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Dated, Washington, D.C. December 31, 2015

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Steven Fish

Administrative Law Judge

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<sup>&</sup>lt;sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Boards Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.